THE NORTHERN IRELAND LAW REPORTS.

1933.

Digitized by the Internet Archive
in 2026

https://archive.org/details/northern-ireland-law-reports_1933

THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

MARCUS D. BEGLEY,

ONE OF HIS MAJESTY'S COUNSEL.

1933.

BELFAST.

PUBLISHED BY THE INCORPORATED COUNCIL OF LAW REPORTING

FOR NORTHERN IRELAND.

REPRINTED 1965

OCEANA PUBLICATIONS NEW YORK

WILDY & SONS LONDON

BIBL.
LONDIN.
UNIV.

BELFAST :

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR NORTHERN IRELAND,

BY

R. CARSWELL & SON, LTD.,

QUEEN STREET.

Lord Chief Justice:

The Right Hon. Sir William Moore, Bart.

Lords Justices of Appeal:

The Right Hon. James Andrews.
The Right Hon. Richard Best.

Chancery Division:

The Hon. Robert Dick Megaw.

King's Bench Division:

The Right Hon. Sir William Moore, Bart.
The Right Hon. Thomas Watters Brown.

Judicial Commissioner Land Purchase Commission

The Hon. Robert Dick Megaw.

Attorney General:

The Right Hon. Anthony Brutus Babington, K.C.

Incorporated Council of Law Reporting for Northern Ireland.

Chairman :
EDWARD S. MURPHY, Esq., K.C.

Ex-Officio Member :
The Right Hon. ANTHONY BRUTUS BABINGTON, K.C., M.P., Attorney-General.

Appointed Members :

JOHN McGONIGAL, Esq., K.C.
EDWARD S. MURPHY, Esq., K.C.
JAMES WILLIAMSON, Esq., K.C.
} *By the Inn of Northern Ireland.*

EDWARD J. McKEAN, Esq., K.C.
WILLIAM LOWRY, Esq., K.C.
J. GERALD DOUGHERTY, Esq.
} *By the General Council of the Bar.*

M. S. MACAULEY, Barrister-at-Law, *By the Ministry of Finance.*
SAMUEL REID, Esq., B.A., *By the Incorporated Law Society.*

Secretary and Treasurer :
JAMES McCONNELL, Esq., Barrister-at-Law.

REPORTERS:

JAMES McCONNELL, Barrister-at-Law.

JAMES REYNOLDS, Barrister-at-Law.

[These Reports will be cited as follows :—[1933] N.I.].

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Alexander *v.* Anderson .. 158
Anderson, Alexander *v.* .. 158
Archbold, McKee *v.* .. 47
Attorney-General & County Council of Down *v.* Newry No. 1 R.D.C. .. 50
Attorney-General *v.* Jaffé .. 189
Attorney-General, Nelson *v.* *In re* Hardy 150

B.

Ball, Johnson *v.*, *In re* George Ball 173
Ball, *In re*, Johnson *v.* Ball 173
Bangor Borough Council *v.* Graham 34
Belfast Harbour Comissioners, Gilmour *v.* .. 114

C.

Church *v.* Tweedie .. 183

D.

Deeney *v.* Doherty and Deeney 80
Dinsmore *v.* Finlay .. 89
Doherty and Deeney, Deeney *v.* 80
Down Co. Co., Attorney-General and *v.* Newry No. 1 R.D.C. .. 50

F.

Finlay, Dinsmore *v.* .. 89

G

PAGE

Gilmour *v.* Belfast Harbour Commissioners 114
Graham, Bangor Borough Council *v.* 34

H.

Hardy, *In re*, Nelson *v.* Attorney-General .. 150
Hastings, McCarthy .. 100

J.

"J.", Rex *v.* 73
Jaffé, Attorney-General *v.* 189
Johnson *v.* Ball, *In re* George Ball 173

M.

MacCartney, *In re* .. 1
McCarthy *v.* Hastings .. 100
McKenna, Rex (Lockhart) *v.* 21

N.

Nelson *v.* Attorney-General, *In re* Hardy 150
Newry No. 1 R.D.C. Attorney-General and County Council of Down *v.* .. 50

R.

Rex *v.* "J." 73
Rex (Lockhart) *v.* McKenna 21

T.

Tweedie, Church *v.* .. 183

TABLE OF CASES CITED.

A.

PAGE

Att. Gen. *v.* Barker .. 198
Att. Gen. *v.* Birmingham, Tame & Rea Drainage District Board 56, 57
Att. Gen. *v.* Bradford Canal Co. 69
Att. Gen. *v.* Constable .. 195, 197
Att. Gen. *v.* Forde .. 155, 157
Att. Gen. *v.* Grand Junction Canal Co. 57, 70
Att. Gen. *v.* Johnson .. 58, 68
Att. Gen. *v.* Mayo Co. Co. .. 58
Att. Gen. *v.* Metcalfe & Greig 70
Att. Gen. *v.* Scott .. 59, 70
Att. Gen. *v.* Sheffield Gas Consumers' Co. .. 58, 69
Att. Gen. *v.* South Staffordshire Waterworks Co. .. 58, 70
Att. Gen. *v.* Wimbledon Housing Estate Co. .. 70

B.

Baird *v.* Mayor of Tunbridge Wells 54, 59
Baldock *v.* Westminster City Council 125
Beamish *v.* Beamish .. 105, 108
Beavan *v.* Mahon Hagan .. 91
Beaven, *Re* 85
Birmingham Canal Co. *v.* Lloyd 57
Blake *v.* Beech .. 23, 25, 30, 32
Blunt's Trusts, *Re* .. 153
Bolch *v.* Smith 121, 125
Bowen, *In re* 153, 157
Brackley *v.* Midland Rly. Co. 123, 127, 139
Brooks *v.* Courtney 122, 128, 138
Butts *v.* Goddard .. 125

C.

Callan *v.* Duffy 186, 188
Campbell *v.* Donnelly 185, 186, 187
Catherwood *v.* Caslon .. 104, 106
Cavalier *v.* Pope 122
Chaplin *v.* Hawes .. 160
Clements *v.* Tyrone Co. Co. 58
Coleshill *v.* Manchester Corporation 123, 126
Conboy's Estate, *In re* .. 177
Cooper *v.* Cooper .. 85
Cooper *v.* General Accident Assurance Corporation .. 164
Corby *v.* Hill 121, 125
Cotton *v.* Wood 165, 167
Craig *v.* Glasgow Corporation 162

D.

PAGE

Danvers *v.* Earl of Clarendon 176
Direct Spanish Telegraph Co., Ltd., *v.* Shepherd .. 11
Dixon *v.* Wells .. 24,25,31
Doherty *v.* Mullins .. 184
Dowling *v.* Birney .. 186

E.

Earl *v.* Lubbock 122
Earle *v.* Bellingham .. 85
Eccles *v.* Murphy 185
Eddleston *v.* Francis .. 43
Ellor *v.* Selfridge & Co., Ltd. 161, 163, 166
Evan's Contract, *In re* .. 93

F.

Fairman *v.* Perpetual Building Society .. 120, 126, 139
Flannery *v.* Waterford & Limerick Rly. Co. 160,165,167,170
Fleet *v.* Johnson & Sons .. 163
Flower *v.* Archdale & Burke 185

G.

Gann *v.* Gregory .. 176, 178, 180
Gautret *v.* Egerton .. 121, 125
Goldsmid *v.* Tunbridge Wells Improvement Commissioners 66
Goodright *v.* Moss .. 105
Goodwin, *In re*, Ainslie *v.* Goodwin 93
Gorman *v.* Hand in Hand Insurance Co. .. 168
Gould *v.* Bacup Local Board 43
Gray *v.* Gray 175
Greene *v.* Greene .. 124
Greenwood, *In re* Goodhart *v.* Woodhead 91

H.

Hall *v.* Brooklands Auto-Racing Club 148
Halliwell *v.* Venables 161, 163, 166
Hayward *v.* Drury Lane Theatre & Moss Empires 126
Hodge's Legacy, *In re* .. 95, 98
Holmes *v.* North Eastern Rly. Co. 124, 128, 135
Hornsey Local Board *v.* Monarch Investment Building Society .. 85, 87
Horrigan *v.* Horrigan .. 95

I.

PAGE

Indermaur *v.* Dames 121, 122, 124, 125, 134, 137, 138

J.

Jewell *v.* Parr 167
Johnson, *In re*, Sly *v.* Blake 84, 85, 86, 88

K.

Keay *v.* Bolton 175
Kennington *v.* Daniel .. 23, 25
Knox, *In re* 103

L.

Labalmondiere *v.* Addison 39
Langham *v.* Governors of Wellingborough School & Fryer .. 165
Latham *v.* R. Johnson & Nephew, Ltd. 121
Lax *v.* Corporation of Darlington 125
Leeds (Duke) *v.* Amherst (Earl) 67
Lloyd *v.* Coote & Ball .. 85

M.

McArdle *v.* McArdle .. 84
McClure & Garrett's Contract, *In re* 84
McKee *v.* Malcolmson .. 127
Maguire & McClelland's Contract, *In re* 83
Maher *v.* Sun Patent Improved Fire Lighters Co. .. 185, 186
Mersey Docks & Harbour Board *v.* Procter 121, 122, 123, 126, 127, 138, 144
Metropolitan Rly. Co. *v.* Jackson 166, 167
Monk, *In re* 157
Morris *v.* Miller 102, 104, 105, 107, 111, 112
Morrow *v.* Morrow .. 106, 109
Murphy *v.* Arrow 26, 29

N.

Norman *v.* Great Western Rly. Co. .. 121, 125, 140, 148

O.

O'Higgins *v.* Walsh .. 91

P.

Packard, *In re* Packard *v.* Waters .. 92, 93, 98
Pardoe, *In re* McLaughlin *v.* Penny .. 84, 85, 87
Peel's Release, *In re* 150, 153, 154, 155, 157

PAGE

Perry v. Statham, Ltd. .. 140
Philps' Will, *In re* .. 178
Pluckwell *v.* Wilson .. 160
Proctor *v.* Bennis .. 55

Q.

Quintin Dick, *In re* .. 98

R.

Randell, *In re* 153
Reed *v.* Passer 102, 105
R. *v.* Bartholomew .. 55
R. *v.* Beech 24
R. *v.* Bembridge 75
R. *v.* Bradbury 75
R. *v.* Bradbury & Edleir .. 76, 78
R. *v.* Brailsford 76
R. *v.* Carlile 77
R. (Daly) *v.* County Cork J. J. .. 23, 25, 28
R. *v.* Gardiner 194, 196, 197, 199, 200
R. *v.* Garrett & Pegge .. 25
R. *v.* Griffin 113
R. *v.* Hammer 103
R. *v.* Henry Mainwaring .. 102
R. *v.* Higgins 75, 77
R. *v.* Hughes 23, 24, 28, 30, 31, 32
R. *v.* Jones 75
R. *v.* Lepine 56
R. *v.* Lindsay 104
R. *v.* Millis .. 103, 111, 113
R. *v.* Munton 75
R. (Lalor) *v.* Queen's Co. J. J. 24, 28
R. *v.* Secretary of State for Home Affairs *Ex parte* O'Brien .. 9
R. *v.* Shaw 24, 31
R. *v.* Treeve 75
R. *v.* Whitaker 76
R. *v.* William Allison *alias* Wilkinson 102
Richardson, *In re* .. 85
Roberts *v.* Gwyrfai District Council 55, 59
Rootes, *In re* 177

S.

Salford Corporation *v.* Hale 37, 44
Scott *v.* London & St. Katherine Docks Co. 161, 163
Shewell—Dwarris .. 48
Slevin, *In re* 157
Smith *v.* Baker & Sons .. 127
Smith *v.* Butcher 174
Smith *v.* Maxwell .. 106
Southgate *v.* Clinch .. 177
Standen *v.* Standen .. 103
Stanley (Lord) *v.* Wild & Son 198
State *v.* Little 191
Sutcliffe *v.* Client's Investment Co. 124, 128, 135

T.

PAGE

Taylor *v.* Popham .. 93
Thatcher *v.* Great Western Rly. Co. 123, 128, 134
Thelwall *v.* Yelverton .. 103, 106
Thompson *v.* Dublin United Tramway Co. 185, 186
Tottenham Local Board *v.* Rowell 43
Tucker *v.* Kayess 153
Tunbridge Wells Corporation *v.* Baird 54

U.

Ulmann *v.* Cowes Harbour Commissioners .. 198
Ussher *v.* Ussher 106

W.

Waddell *v.* Harshaw .. 84, 85
Wakelin *v.* London & South Western Rly. Co. .. 160, 164
Walker *v.* Cusin 175
Wallace *v.* Wallace .. 102
Walton & Co. *v.* Vanguard Motor Bus Co. .. 164
Weldon *v.* Weldon .. 182
West Ham Local Board *v.* Maddams 43
Wicks *v.* Hunt 57
Willmot *v.* Barber .. 55, 67
Wilson *v.* Bolton Corporation 38, 41, 42, 43, 45
Wilson, *In re* 153
Wilson, Sons & Co. *v.* Barry Rly. Co. .. 123, 128, 134
Wing *v.* London & General Omnibus Co. 166, 167
Woods *v.* Woods 103, 106
Wright *v.* The Commissioners Of Inland Revenue, *In re* 11
Wright *v.* London & North Western Rly. Co. .. 135

Y.

Yelverton *v.* Longworth .. 105

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

ESTATE OF MACARTNEY (1).

C.A. 1932.

(N.I. 1816).

June 5.
Oct. 28.

Stamp—Document stamped in Irish Free State—Admissibility in evidence in Courts in Northern Ireland—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39) *s.* 14—*Double Taxation Relief Act* (*Northern Ireland*), 1923 (13 *&* 14 *Geo.* 5, *c.* 14) *Sch. Part* 3.

The vendor of an estate situate in County Antrim, which was in process of sale through the Land Purchase Commission under the Northern Ireland Land Act, 1925, executed a mortgage to the Bank of Ireland of the bonus payable in respect of the sale. This instrument, which was dated the 24th day of April, 1926, contained a covenant on the part of mortgagees to re-assign the premises on re-payment of the principal and interest thereby secured. It was executed by the mortgagor at his residence in County Antrim and by the mortgagees in Dublin, where it was stamped with an Irish Free State stamp in respect of the duty chargeable thereon.

Upon the ruling of the final schedule of incumbrances the Judicial Commissioner declined to accept the mortgage in evidence on the ground that it was not properly stamped in accordance with the provisions of the Stamp Act, 1891.

Held, by the Court of Appeal (reversing the decision of the Judicial Commissioner) that the mortgage was chargeable with stamp duty in the Irish Free State within the meaning of the Double Taxation Relief Act (Northern Ireland), 1923, Part 3, paragraph (*a*), and that it was accordingly properly stamped and admissible in evidence in Northern Ireland.

(1) In the Court of Appeal before Sir William Moore, Baronet, L.C.J., and Andrews and Best, L.JJ.

1932.

ESTATE OF MACARTNEY.

APPEAL from an order of the Judicial Commissioner.

Mr. Carthanach George Macartney was the owner of an estate situate in County Antrim, which, being tenanted land, vested in the Land Purchase Commission, Northern Ireland, under the provisions of the Northern Ireland Land Act, 1925.

On 24th April, 1926, Mr. Macartney executed to the Bank of Ireland a mortgage of the bonus payable in respect of the sale of such lands to the tenants. This document contained a covenant on the part of the Bank, that, on repayment with interest of the sums secured by the mortgage, the Bank should re-assign the premises to the mortgagor. It was executed by Mr. Macartney at Lissanoure, in County Antrim, and was subsequently sealed by the Bank of Ireland in Dublin, where an Irish Free State Stamp was impressed on the document.

Upon the ruling of the final schedule of incumbrances the mortgage was tendered in evidence on behalf of the Bank for the purpose of vouching their claim to the bonus.

Part 3 of the Schedule to the Double Taxation Relief Act (Northern Ireland), 1923, contains the following provision:

"(*a*) Where on or after the first day of April, "nineteen hundred and twenty-three, an instrument "is chargeable with stamp duty in Northern Ireland "and in the Irish Free State, and has been stamped "in one of those countries, the instrument shall, to "the extent of the duty it bears, be deemed to be "stamped in the other country:"

The Judicial Commissioner held that the document was not properly stamped and he accordingly declined to receive it in evidence.

MEGAW, J.

His Lordship delivered the following judgment:—

In this matter I am called on to decide whether a document purporting to alter the normal destination of the bonus in this estate, has been properly stamped within the provisions of the Stamp Act, 1891.

No point in regard to the validity of the stamp, an Irish Free State Stamp, has been raised by any party in

the ruling of the schedule, and the Ministry of Finance of Northern Ireland have indeed supported the contention that the document, stamped as it is, may be received in evidence in Northern Ireland.

By section 14 of the Stamp Act I am bound to take notice of any omission or insufficiency of the stamp on an instrument chargeable with duty, produced in evidence, and it is under that section that the point has been raised by me. On the face of it I regarded it as a rather extraordinary state of affairs that a document dealing with a fund entirely under the disposal of a Northern Ireland Court, which by no possibility could be dealt with by a court of another country, a fund connected with lands situate in Northern Ireland—a part of the United Kingdom—executed in Northern Ireland by the owner and vendor of the lands, who was resident in Northern Ireland, to a Banking Company, who are the bankers of the Commission itself, the bankers through whom the bonus is issued, and the bankers of the Northern Ireland Courts, should purport to be stamped with a stamp of the Irish Free State which, as I understand the law, is no part of the United Kingdom.

The facts relating to this particular transaction, so far as I have been able to ascertain them, are as follows :—

Carthanach G. Macartney's lands, situate in the north part of County Antrim, being tenanted lands under the Act of 1925, were returned by him as falling under the provisions of section 17 of that Act, by particulars lodged on 23rd March, 1926, and in due course appeared in a provisional list issued on 24th November, 1930. On 24th April, 1926, a document was signed by Mr. Macartney, purporting to convey to the Bank of Ireland, by way of mortgage, to secure his overdraft, the bonus, which would or might become payable to him if the transfer of the lands to the tenants contemplated by the Act was completed. I may here observe that at the date of the execution by Mr. Macartney, it was by no means assured that this bonus would be payable to him. Apart from other considerations, if Mr. Macartney died before the

1932.

ESTATE OF MACARTNEY.

MEGAW, J.

appointed day, the bonus would not form part of his estate at all, but would be payable, if the other conditions were fulfilled, to the person who might be the owner at the appointed day. The Northern Ireland Land Act, 1929, had not then been passed.

This document was executed by Mr. Macartney in County Antrim, and appears to have been afterwards sealed by the Bank of Ireland in the Free State.

A Free State stamp was impressed on the document on 29th April, 1926, and afterwards further stamps of the Free State, evidently to cover further advances, were impressed on 31st July, 1926, and 2nd July, 1928.

For what purpose the seal of the Bank on the document was affixed has not been disclosed.

When the matter came on for vouching, the Examiner raised the point that the document was insufficiently stamped. His objection was to the amount of the stamp as there had been advances made after July, 1928, which in the ordinary course would not have been covered by the stamp. It was brought back to him with the deficiency made up by a Free State stamp to the Free State revenue authority.

In these circumstances the document was produced in evidence before me on 29th April, on the ruling of the bonus item on the Final Schedule, and I raised the question of compliance with section 14 of the Stamp Act. Indeed it was manifest that if that section stood unmodified it was impossible that this document should be received in evidence in a court of the United Kingdom.

The solicitor for the Bank contended that the stamping as it stood was regular and I granted an adjournment to enable him to have authorities produced showing the accuracy of his contention.

At the adjourned hearing on 6th May, Mr. Robb appeared on behalf of the Bank and contended that by the joint operation of the Government of Ireland Act, 1920, sections 21 and 29, the Free State Consequential Provisions Act, 1922, section 5, Statutory Rules 1923 No. 406, and the Double Taxation Act, Northern Ireland, 1923, payment of the Stamp duty

in the Free State made the instrument receivable in evidence in Northern Ireland.

Before considering the question as to whether such an instrument, as that tendered in evidence, is chargeable with tax in the Free State, and to appreciate the transaction between the vendor of the lands and the Bank, it is necessary to refer to the nature of the bonus.

This bonus, described as "percentage," first appeared in the administration of Land Purchase in 1903. By section 48 of the Irish Land Act, 1903, better known as the "Wyndham Act" it was enacted:

> "For the purpose of aiding the sale of estates "under this Act, the Land Commission may, in the "prescribed manner and at the prescribed time, "out of advances by the National Debt Com- "missioners from the said fund (*i.e.*, the Land "Purchase Aid Fund), pay to the vendor of each "estate sold a sum calculated at the rate of twelve "per cent. on the amount of the purchase money "advanced under the Land Purchase Acts."

There were certain other provisions regulating its application but they are not material to the present issue; I need only observe that this sum became the subject of a crystallized right in respect of any particular estate "at the prescribed time," which was at the date of the allocation of the purchase money. Until then its existence was contingent, and the right to it could not be considered a legal chose in action.

The Northern Ireland Land Act, 1925, section 4, adopted the same policy in the assistance of land purchase. This section gave statutory recognition to the popular name "bonus" and in a schedule specified the rates at which the bonus should be calculated, but the old practice continued in force as regard its allocation. The "appointed day" however, takes the place of the date of the agreement for sale under the Act of 1903, as the notional purchase agreement under section 8 of the Northern Ireland Land Act, 1925, must be deemed to be made on that day. In the normal course the bonus is payable to the persons in the position of vendors on the appointed day,

1932.

ESTATE OF MACARTNEY.

MEGAW, J.

and, occasionally, an owner being desirous of ready money, has used the prospect of receiving the bonus in the future as a security for raising a present advance. Transactions of this kind have been recognised and acted on at allocation of the purchase money of an estate, but any transfer, assignment or mortgage of the bonus can only operate as a covenant to assign when the prospective fund comes into actual existence and has the character of an equitable mortgage. (See *Collyer v. Isaacs* (1).) As stated in Halsbury, vol. 13, p. 74, "Neither in equity nor at law can there be an "assignment of what has no existence. The assign- "ment operates as a contract, and if it is for value, "then when the property comes into existence, "equity, treating that as done which ought to be done, "fastens upon the property, and the contract to assign "becomes in equity a complete assignment." The right to the bonus as I have said can only become effective when the order of the Court is pronounced in regard to it at allocation. The time of allocation is "the prescribed time" by the rules made under section 48. As a court of equity the Judicial Commissioner must have regard to all equities when, after having given directions to draw the bonus, he proceeds to allocate it, and it has been established, by decisions of the Court of the Land Commission, that effect shall be given to assignments and charges of the bonus, which at first exist as covenants to assign.

Of necessity the land, in respect of which the bonus has become payable, is situate in Northern Ireland. The order by which the bonus comes into existence is made by a Northern Ireland Court, and anything in the nature of property in connection with the bonus is located in Northern Ireland.

It is from the assignment, or covenant to assign, that any right other than that of the vendor takes its origin, and such right or equity comes into existence when the vendor executes an assignment of it, or creates a charge on it. The vendor in the present case, as appears from the document produced, executed it in Lissanoure, County Antrim, a considerable time

(1) 19 Ch.D. 342.

before the appointed day. The document, signed by him in Northern Ireland, purports to charge a sum that will become payable only when and if an order is made for its payment by a Northern Ireland Court. Northern Ireland is part of the United Kingdom. The Irish Free State is not. Section 14 of the Stamp Act, 1891, discriminates between instruments produced in courts of the United Kingdom, instruments executed in any part of the United Kingdom, instruments relating to property situate, or to any matter or thing done, or to be done in any part of the United Kingdom, on the one side, and corresponding instruments elsewhere.

By itself the Government of Ireland Act, 1920, is inapplicable. This Act did not contemplate an Irish Free State but Southern Ireland a part of the United Kingdom, and the sections dealing with double Taxation in that Act affecting the Irish Free State do not apply.

As regards section 5 of the Irish Free State (Consequential Provisions) Act, 1922, which is expressed in the side note as "Provision as to relief from double "taxation" it is enacted that "If His Majesty in "Council is pleased to declare that, under the law in "force in the Irish Free State, any tax is payable in "respect of a subject of charge, in respect of which a "corresponding tax is payable also in Great Britain" that under certain conditions relief may be granted from a second tax.

This was found not to be so framed as to affect Northern Ireland, though I think an Order in Council made under the Act, did purport to make it operative; but as regards Northern Ireland an Act of Parliament was passed in 1923 to which I shall refer later.

During the hearing I put the following hypothetical case to Mr. Robb. Suppose there has been a sale of lands in the Irish Free State, in a case where both vendor and purchaser resided and were ordinarily resident in the Irish Free State and after the conveyance was executed in the Free State by the vendor, it was found that the purchaser was visiting in Northern Ireland and executed the conveyance in Northern

1932.

ESTATE OF MACARTNEY.

MEGAW, J.

Ireland. Would payment of the stamp duty on the conveyance in Northern Ireland relieve any party, subsequently producing the document in a Free State court, from the consequences of the instrument being improperly stamped ? He boldly faced the issue and said that it would. I think he was driven to make that answer to support his contention.

The case seems to me to turn on whether an instrument relating to the bonus is an instrument properly chargeable with duty in the Irish Free State.

I had some doubt as to the establishment through which the Bank of Ireland carries on its financial operations in Belfast, knowing that this Belfast establishment carries on our High Court banking operations and the financing of the Land Purchase Commission, and being aware also that it contained a separate register for the registration and transfer of British funds. At the hearing I asked had it an independent organisation in Belfast, but a memorandum since then furnished to me shows that the Government of this Bank, doing such important business in this capital, as I have already mentioned, is situate in the Irish Free State, and subject to the laws of the Irish Free State, a rather anomalous state of affairs.

So far as the Order in Council referred to by Mr. Robb is concerned, I do not think it is of any assistance to his argument. There were two Orders in Council under the Irish Free State (Consequential Provisions) Act, 1922, closely following each other. The first was made on the 27th of March, 1923. It is No. 405 of the Statutory Rules and Orders, 1923, and was primarily concerned with the segregation of the Free State from the United Kingdom, and the effect of this segregation on existing enactments as to their operation in regard to the still existing United Kingdom and His Majesty's Dominions. It was the second, however, dealing with relief in respect of double taxation made 29th March, 1923, No. 406, to which I was referred. The former of these orders some of whose provisions are essential to and form part of the groundwork of subsequent orders including Order No. 406, is at least as essential to an argument based on Orders in

Council in regard to the operation of the taxing laws as the second, came under review of the English Court of Appeal in the important case of *R. v. Secretary of State for Home Affairs : Ex parte O'Brien* (1).

In that case Scrutton, L.J., in his incisive way, criticised adversely the validity of the order and came to the conclusion that parts of it at any rate were *ultra vires* and invalid, and Atkin, L.J., said that he shared in the " doubts " of Scrutton, L.J., as regards the order.

Probably it was in consequence of the judgments in this case that it was discovered that legislation for Northern Ireland was necessary just as much as for the reason mentioned by Mr. Robb.

In my opinion the question at issue must be resolved by the Double Taxation Relief Act (Northern Ireland), 1923, an Act which is made retrospective so as to operate from 29th March, 1923, the date when the inoperative order had been made. The part of the Act affecting the issue is to be found in the Schedule, Part 3, paragraph (*a*).

This, following the words of the Order in Council, reads. [His Lordship read the paragraph.]

As regards the instrument of 24th April, 1926, the validity of its stamping depends on whether it was chargeable with stamp duty in the Free State. To determine this it is necessary again to consider section 14 sub-s. 4 of the Stamp Act, 1891. This sub-s. enacts that " an instrument executed in any part of the " United Kingdom, or relating, wheresoever executed, " to any property situate, or to any matter or thing " done or to be done, in any part of the United " Kingdom, shall not, except in criminal proceedings, " be given in evidence, or be available for any purpose " whatever, unless it is duly stamped in accordance " with the law in force at the time when it was first " executed."

Article 73 of the Irish Free State Constitution Act reads : " Subject to this Constitution and to the extent " to which they are not inconsistent therewith, the " laws in force in the Irish Free State, at the date of

(1) [1923] 2 K.B. 361.

1932.

ESTATE OF MACARTNEY.

MEGAW, J.

"the coming into operation of this Constitution, shall "continue to be of full force and effect, until the same "or any of them shall have been repealed or amended "by enactment of the Oireachtas."

There is no evidence before me as to any enactment amending the law, and I have no proof of what the stamp laws in the Irish Free State now are, but, assuming that no change has been made since 1923, can this be construed so as to mean that the words of section 14 sub-s. 4 of the Stamp Act, "an instrument "executed in any part of the United Kingdom," shall have effect as if the Free State Act had not passed, and that an instrument executed say, in the Orkney Islands, relating to a contract of employment in those islands, would be sufficiently stamped if impressed with a Free State Stamp, or that a corresponding contract of employment in Cork would be sufficiently stamped with an English stamp?

It seems to me that the chargeability for stamping taxation must have regard to the separation of the United Kingdom, and that the law in force in the Free State at 1st April, 1923, must be construed as if it read: "an instrument executed in any part of the "Irish Free State, or relating wheresoever executed, "to any property situate or to any matter or thing "done or to be done in any part of the Irish Free "State."

Holding that opinion, and assuming that the Irish Free State law remains the same as before the Consequential Provisions Act, I now consider whether this instrument was executed in the Irish Free State, as clearly it does not relate to property in the Irish Free State or to anything done or to be done there.

I am clear that the original execution took place in Northern Ireland and that any validity or force that the instrument of 24th April, 1926, has, arises from that execution. The execution by the Bank of Ireland was a work of supererogation. The forms of mortgage of a like character contained in that well-known work on precedents, the Encyclopædia of Forms and Precedents, prescribes execution by the mortgagor alone. The form of statutory mortgage under the

Conveyancing Act is satisfied by a like execution. I have made enquiries as to mortgages of the bonus to other Banks and I find that these are not executed by the mortgagee. Such documents, viz., those executed by a purported assignor or mortgagor alone have been recognised again and again by this Court.

Indeed the equity which is created by a purported assignment of the bonus in a case like the present, entirely springs from the execution by the vendor.

I am of opinion that the instrument in the present case was not one chargeable with stamp duty in the Irish Free State within the provisions of the Double Taxation Relief Act (Northern Ireland), 1923, when it became an operative instrument, and that the action of the Bank of Ireland in having a series of unnecessary stamps impressed in the Irish Free State and the payment of a penalty there does not enable the instrument to be given in evidence in the present case.

Of course this decision is confined to cases of a like nature, where an instrument is found not to be chargeable with stamp duty in the Irish Free State, and is dependent on the actual existing facts of the case before me.

The Bank of Ireland appealed to the Court of Appeal.

Murphy, K.C., *Robb*, K.C., and *Curran* for the appellants :—

The execution of the mortgage by the Bank of Ireland, although not strictly necessary, was in no way unlawful. This being so the document, upon execution by the Bank in the Irish Free State, became chargeable with stamp duty in that country. Once this is established the provisions contained in Part 3 of the Schedule to the Double Taxation Relief Act (Northern Ireland), 1923, apply with the result that the instrument is deemed to be duly stamped in Northern Ireland. [As to the meaning of the word "chargeable" they referred to *In re Wright and the Commissioners of Inland Revenue* (1) and to *Direct Spanish Telegraph Company, Limited v. Shepherd* (2).]

Cur. adv. vult.

(1) 11 Exch. 458.

(2) 13 Q.B.D. 202.

C.A. 1932.

ESTATE OF MACARTNEY.

SIR WILLIAM MOORE, L.C.J.

SIR WILLIAM MOORE, L.C.J.: This case raises its own question almost as succinctly as if it were a Case Stated wherein all the facts are found.

By a mortgage of date, April 24th, 1926, made between Carthanach George Macartney, of Lissanoure, County Antrim, hereinafter called the mortgagor, of the one part, and The Governor and Bank of Ireland of the other, hereinafter called the mortgagees, reciting an agreed sale between the mortgagor and his tenants in various Baronies in the County of Antrim, the mortgagor covenanted with the mortgagees for repayment to them on demand, of all advances present and future, and further as beneficial owner did assign to the mortgagees the bonus or percentages, to which by virtue of such sale the mortgagor might become entitled, provided always that on repayment with interest of principal and interest, the mortgagees should re-assign the premises to the mortgagor; with other provisions not in my judgment hereto material.

This instrument was executed in the County of Antrim in Northern Ireland by the said Carthanach George Macartney and by the mortgagees under their common seal in Dublin.

The learned Judicial Commissioner, although he held that a chose in action had of itself no actual locus, and this was only a mortgage or a charge not on lands but of a chose in action, rightly laid stress on the fact that the debt itself could only be created under a decree of a tribunal in Northern Ireland, and indeed, as the appellants themselves admitted by their own application to that tribunal, it was *prima facie* the proper court for them to resort to in this matter. In my opinion it is obvious that no court in the Free State could by any form of order, directly or indirectly, declare a bonus in respect of lands sold in Northern Ireland, or (a bonus once declared) a charge on such bonus a valid charge, any more than another court could do so in Canada or Australia in respect of such lands.

Proof, at the hearing, was offered of the charge in question on behalf of the mortgagees by tendering the said instrument as evidence of title to the bonus coming

C.A. 1932.

ESTATE OF MACARTNEY.

SIR WILLIAM MOORE, L.C.J.

to the mortgagor, but it was rejected by the Commissioner as lacking a stamp conformable with the law in force in Northern Ireland, although duly stamped according to that in the Free State.

Was this decision right? In my opinion it would clearly have been so, if the case were governed by the Stamp Act, 1891. I think I am correct in stating that the appellants have accepted this view of the learned Commissioner. If and when the Free State, on its creation, became in a similar position to Canada (and it is unnecessary to go through all the legislation which led to this result of that country ceasing to be part of the United Kingdom and a contributor to Imperial Revenue in stamp duty), the like results would have happened to a deed tendered in evidence in Belfast, as it could be similarly objected to if it bore the stamp either of Canada or of the Irish Free State.

But the Legislature has, in the case of the Free State, taken a step to relieve such a situation, and provision is made by Part 3 of the Schedule to the Double Taxation Relief Act (Northern Ireland), 1923, for interchangeability of stamping the same instrument in either Northern Ireland or the Free State, where it is "chargeable" in either.

The Legislature can only have thought this necessary if my previous premises about the relative positions of Northern Ireland with the Free State and with Canada were well founded, and for this reason I have not considered it necessary to set out in legislative detail the stages leading up to this situation.

Is then the present instrument "chargeable" in either? If so, stamping in either, subject to adjustment of value, suffices in the other.

I do not myself understand in the present case why there should be this anxiety about the nature of the particular stamp with which the document is to be impressed. The origin of the stamp can not surely add anything to the validity of the deed. It is suggested that there is something in the nature of an undisclosed financial or political stratagem behind all this, as to which I say nothing except that, even assuming there is one, if it is permissible by Statute

C.A. 1932.

ESTATE OF MACARTNEY.

SIR WILLIAM MOORE, L.C.J.

we cannot and ought not to prevent it, and I do not put the solution of this problem, if problem there be, further.

This again is the reason why I am not moved by the strictures of the learned Commissioner upon the undesirability of the present position as between Northern Ireland, the Free State and the Bank of Ireland, a Free State Corporation, as being agent for the Land Purchase Commission in the North of Ireland.

If such circumstances as exist are, as the Commissioner points out, unsatisfactory, it is not for the Court of Appeal but for the Parliament of Northern Ireland to rectify them. They can denounce this agreement as they have express powers under the Statute to do so.

The last contention of the Commissioner is that because the consideration almost entirely passes from the mortgagor in the present deed, it should be considered as a deed in which the mortgagees in the Free State have passed really no interest, that therefore it is not properly "chargeable" there. I think if any consideration passes it can not be ignored. It is true that the same result would be equally arrived at by the execution of a sole power of attorney enabling the Bank to receive the whole bonus, and then to account and pay over the balance of the moneys, or in the alternative by the mortgagor executing a simple deed of charge to which the mortgagees need not be parties, in which cases nothing could be said to have passed from the mortgagees or, third, to have an indenture as presumably in the present case they have agreed to do.

But here the mortgagor has elected to have an indenture and to proceed by the last method, and he has received, for what it is worth, a covenant from the mortgagees to re-assign or release the bonus if paid off. This is certainly consideration.

I think the consideration is small, perhaps in fact worthless; perhaps even, as the Commissioner says, not usual, but that it amounts to legal consideration there is no doubt, and that could not have passed without execution by the mortgagees, who did so

execute it at their head office, and I can find no obligation upon them to come into Northern Ireland to do so. The Legislature again could provide for such but it has not done so.

SIR WILLIAM MOORE, L.C.J.

I therefore think that the deed in its form was "chargeable," within the meaning of the Act of 1923, in the Free State equally in the alternative with Northern Ireland.

I think that it would be hard that the mortgagor, who has had nothing to say to these troubles occasioned by the preference of the mortgagees (with their own agents in Belfast) to execution in the Free State, that their costs of this appeal should be charged, as between mortgagor and mortgagees, against him.

I think the appeal should be allowed, and we will either amend the Commissioner's order accordingly, or send it back to him if the appellants so desire.

ANDREWS, L.J.

ANDREWS, L.J. : The question for determination in this case arises in consequence of the change which took place in the constitution of the United Kingdom in the year 1922 by the establishment of the Irish Free State. The portion of Ireland so designated is no longer part of that Kingdom.

By section 14 sub-s. 1 of the Stamp Act, 1891, it is the duty of the judge, in whose court, in any part of the United Kingdom, an instrument chargeable with duty is produced as evidence, to take notice of any omission or insufficiency of the stamp thereon ; and by section 14 sub-s. 4 it is enacted that, unless the procedure as to the payment of penalty provided by the section be followed, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed. Under this sub-section it is clear that stamping is essential :—

C.A. 1932.

ESTATE OF MACARTNEY.

ANDREWS, L.J.

(*a*) When the instrument is executed in any part of the United Kingdom, or

(*b*) When it relates, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom.

The mortgage of 24th April, 1926, which the Judicial Commissioner rejected as evidence on the ground that it had only been stamped in the Irish Free State, was executed by the mortgagor in County Antrim and relates to the bonus payable on the sale of land situate in County Antrim. It therefore clearly comes within the first, and, doubtless also, within the second alternative in the section.

Now by Article 73 of the Constitution of the Irish Free State, which is set out in the First Schedule of the Irish Free State Constitution Act, 1922, it is provided that, subject to the Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State, at the time of the coming into operation of the Constitution, shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas. Accordingly, section 14 of the Stamp Act, 1891, which I have cited above, was made applicable to the Irish Free State by the substitution in that section of the words "Irish Free State" for the words "United Kingdom," and it is admitted that this law is still in force in the Irish Free State.

The mortgage of 24th April, 1926, after having been executed by the mortgagor, was sent to the Irish Free State, where, as the learned Commissioner states in his judgment, the government of the Bank of Ireland, who are the mortgagees, is situate. The Judicial Commissioner considers it a rather anomalous state of affairs that this Bank, doing such important business in Belfast, should have its seat of government in Dublin, and be subject to the laws of the Irish Free State; but it must be remembered that the head-quarters of the Bank have always been in Dublin, and it of course continues to transact most important

business in the Free State. In my opinion, however, the important point to be borne in mind is the fact that the Bank's head office is situate in the Irish Free State, and not whether such a state of affairs is or is not anomalous. It is at the Bank's head office that its seal is naturally affixed; and it was, accordingly, in Dublin that this mortgage was executed by them. *Prima facie*, therefore, on execution by the Bank, the mortgage was chargeable with duty in the Irish Free State.

The Commissioner has, however, held that the mortgage was not properly chargeable with Free State duty because it took its validity or force from the first execution by the mortgagor in Northern Ireland, and that its execution by the Bank of Ireland was a work of supererogation. I do not for a moment dispute that execution by a mortgagee is in practice frequently dispensed with. The mortgagee's principal duty is performed when he has advanced the mortgage money; but he is under an obligation by virtue of the proviso for redemption to re-assign the mortgaged premises on payment off of the mortgage debt. Furthermore, there are several clauses in this mortgage which are matters of special agreement, such as the non-application of the restriction imposed by section 17 of the Conveyancing Act, 1881, upon the right to consolidate mortgages, modifications of the statutory power of sale, a provision as to the continuing character of the security, and the non-merger in the mortgage security of simple contract debts. Now, although these provisions may be in aid of the mortgagee, still, being matters of express agreement, it is proper that the accuracy of the deed in these respects should be testified to by the mortgagee, if only to prevent his making any suggestion thereafter that such clauses ought to have been still more favourably expressed towards him. It is enough, however, in my opinion, for the determination of the question before us, that this mortgage deed, drawn in form as a mortgage indenture *inter partes*, and not merely as a charge by way of deed poll, was perfectly properly executed by the Bank in accordance with what we are assured

C.A. 1932.

ESTATE OF MACARTNEY.

ANDREWS, L.J.

is their common practice. Accordingly, I hold that the deed was chargeable with duty in the Irish Free State under section 14 sub-s. 4 of the Stamp Act, 1891. In these circumstances, it seems to me that paragraph (*a*) of Part 3 of the Schedule to the Double Taxation Relief Act (Northern Ireland), 1923, applies. This clause provides that where on or after 1st April, 1923, an instrument is chargeable with stamp duty in Northern Ireland and in the Irish Free State, and has been stamped in one of those countries, the instrument shall, to the extent of the duty it bears, be deemed to be stamped in the other country. It is admitted that this mortgage has been fully stamped in the Irish Free State, as to a certain excess under penalty, and it is therefore deemed to be stamped and accordingly admissible in evidence in Northern Ireland. The order of the learned Commissioner, dated 6th June, 1932, should therefore in my opinion be discharged [Unrevised.]

BEST, L.J.

BEST, L.J. : The question for determination in this case is whether the Judicial Commissioner, when ruling on the bonus item in the final schedule of incumbrances on the above estate, rightly refused to receive in evidence a document purporting to mortgage that bonus to the Governor and Company of the Bank of Ireland. The mortgage is dated the 24th day of April, 1926, and is stated to be executed by the said Carthanach George Macartney, at Lissanoure, Killagan, County Antrim, and by the said Governor and Company at the Bank of Ireland, Dublin. It was stamped by the Bank in the Free State with the duty chargeable there, but was not stamped in Northern Ireland. Section 14, sub-s. 1, of the Stamp Act, 1891, makes it incumbent on a Judge in any part of the United Kingdom, upon the production of an instrument chargeable with any duty, as evidence in any court of civil judicature, to take notice of any omission or insufficiency of the stamp thereon, and by sub-s. 4, save as provided in sub-ss. 1, 2 and 3 of the section, an instrument executed in any part of the United Kingdom or relating, wheresoever executed, to any property

situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped, in accordance with the law in force at the time when it was first executed.

The mortgage, the instrument in question here, was executed in the County of Antrim, a part of the United Kingdom, and it relates to property, *viz.*, the bonus, situate in the United Kingdom, so that it could not be given in evidence in a civil court of the United Kingdom, unless it was duly stamped in accordance with the law in force at the time when it was first executed.

If, therefore, the matter had rested here, the learned Judicial Commissioner would clearly have been right in rejecting the mortgage as evidence in conformity with the provisions just cited. But Article 73 of the Constitution of the Irish Free State, which will be found in the First Schedule to the Irish Free State Constitution Act, 1922, provides that, subject to this Constitution, and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State at the date of the coming into operation of this Constitution, shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Parliament of the Irish Free State, and it was proved to our satisfaction during the argument that the Stamp Act, 1891, continues to be in full force and effect in the Irish Free State and was so at the time of the execution of the mortgage by each party to it.

Further, if the instrument were properly chargeable with duty in the Irish Free State, it ought in accordance with the provisions of the Double Taxation Relief Act (Northern Ireland), 1923, to have been received in evidence, for in the Schedule to that Act, Part 3, paragraph (*a*), it is provided that " where on and after " the 1st day of April, 1923, an instrument is charge- " able with stamp duty in Northern Ireland and in " the Irish Free State, and has been stamped in one " of these countries, the instrument shall, to the extent

C.A. 1932.

ESTATE OF MACARTNEY.

BEST, L.J.

"of the duty it bears, be deemed to be stamped in the "other country," and the learned Judicial Commissioner in my opinion rightly states that the validity of its stamping depends on whether it was chargeable with stamp duty in the Free State.

It was so chargeable if there were nothing irregular about its execution by the Bank in that country.

What is there in law to prevent a mortgagee executing a mortgage deed made, as expressed in this case, between the mortgagor of the one part and the mortgagee of the other? If it were not unlawful for the Bank to execute the deed, it became, upon execution, subject to the payment of duty in the Free State.

I agree that the order appealed from should be discharged.

Solicitor for the appellants: *White, McMillan & Wheeler.*

J.D.C.

REX (LOCKHART) v. McKENNA (1).

K.B.D.
1932.

May 2.
June 16.
July 1.

Betting—Petty Sessions—Jurisdiction of Justices—Procedure before Justices—Charge against defendant of using premises for the purpose of betting with persons resorting thereto—Whether provisions as to information and summons in Betting Act, 1853, *mandatory or permissive—Betting Act,* 1853 (16 *&* 17 *Vict. c.* 119) *sections* 1, 3, 8, 10, 11.

The defendant was arrested on a warrant issued under section 11 of the Betting Act, 1853. He was brought before the Petty Sessions Court on the charge, that he being the user of a certain house situate in the city of B., did use the same for the purpose of betting with persons resorting thereto. On the charge being proceeded with before the magistrates a preliminary objection was raised to the hearing of the charge on the ground (*inter alia*) that no summons had been served on the defendant charging him with the offence alleged, a summons being, it was submitted, a condition precedent to any proceedings under the Act charging an offence. The magistrates dismissed the case without prejudice, but stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.) that the magistrates were wrong in point of law in dismissing the charge on the ground that the information or summons was a condition precedent to the exercise of their jurisdiction, and that it should be remitted to them to proceed according to law.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the Resident Magistrate and Justices sitting at Belfast Petty Sessions, at the instance of the complainant, pursuant to the provisions of an Act to improve the administration of the law so far as respects summary proceedings before Justices of the Peace (20 and 21 Vic., c. 43).

At a Petty Sessions holden in and for the Petty Sessions District of Belfast, on Thursday, the 3rd day of December, 1931, before us the undersigned Resident Magistrate and Justices of the Peace acting

(1) In the King's Bench Division before Sir William Moore, Baronet, L.C.J., and Brown, J.

K.B.D. 1932.

REX (LOCKHART) v. MCKENNA.

in and for the Petty Sessions District of Belfast, in the County of the City of Belfast, one James McKenna, the above-named defendant, was charged that "he "being the user of a certain house situate at 9, Castle "Arcade, in the City of Belfast, did use the same on "the 5th day of November, 1931, for the purpose of "betting with persons resorting thereto."

The defendant was arrested on a warrant issued under sec. 11 of the Betting Act, 1853. He was brought before the Court on the 6th November, 1931, when it appeared that a charge had been entered up against him in the Police Book of using the said premises for the purpose of betting with persons resorting thereto.

The case was adjourned to the 13th November, 1931, to enable the police to be professionally represented.

On the 13th November, 1931, Mr. Mussen, Crown Solicitor, appeared and was proceeding to call evidence when Mr. Campbell, K.C., intervened and asked to know what was the charge against defendant. Mr. Mussen stated the subject of the charge. Mr. Campbell then raised a preliminary objection to the hearing of the charge by us on the grounds: (*a*) that the proceedings were not properly brought before the Court inasmuch as they were proceedings initiated by an information sworn by a private person, a member of the public, who should appear to prosecute; (*b*) that that information was bad as not binding the Informer to prosecute and not disclosing evidence justifying the issue of the warrant; and (*c*) that no summons had been served on the defendant charging him with the offence alleged, a summons being, as Counsel submitted, a condition precedent to any proceedings under the Act charging an offence.

The case was adjourned to the 24th November, 1931, and subsequently to the 3rd December, 1931.

On that date we asked the Reverend Donald R. Mackay, on whose information the warrant was issued, whether he desired to prosecute. He replied that he did not desire to prosecute, but was prepared to give evidence. Mr. Mussen then intimated that he wished to go on with the charge appearing in the books.

Sergeant Lockhart was examined and proved the arrest. He said that on bringing the accused on 5th November, 1931, to Chichester Street Police Station he had entered up the charge against him. After further argument we dismissed the case without prejudice.

Copies of the information, warrant and decision are attached.

And herein the judgment of the Court is required as to whether we, the said Justices, were correct in point of law in our determination as aforesaid or as to what should be done in the premises.

J. G. Dougherty for the complainant:—

The only question to be decided is, should there be a further information and further summons. The statute of Henry VIII which has been referred to, only applies to England. *Blake v. Beech* (1), which is relied on by the defendant is distinguishable from the present case, and is contrary to many of the decisions in Ireland including *Reg. (Daly) v. Justices of Cork* (2). The complaint has been properly and legally made against the defendant. I submit that the law applicable is correctly stated in the dissenting judgment of Field, J., in *Blake v. Beech* (1). In *Reg. v. Hughes* (3), Field, J., said in his judgment: "I have again considered the case of *Blake v. Beech* (1), and with the result that I am unable to alter the view which I then took of that case." In *Reg. (Daly) v. Justices of Cork* (2), Gibson, J., said in his judgment: "It has been laid down in a number of cases, of which *Reg. v. Hughes* (3), and *Kennington v. Daniel* (4) are recent examples, that summons is process, and that where the defendant appears the complaint may be varied and a new complaint put forward. In most of these cases there was a tacit waiver of objection, but the *ratio decidendi* of many of the judges seems to affirm that, where the defendant is present, a complaint may be then and there made, without any

(1) 1 Ex.D. 320.
(2) [1898] 2 I.R. 694.
(3) 4 Q.B.D. 614, 631.
(4) 22 L.R.I. 667.

K.B.D. 1932.

REX (LOCKHART) v. MCKENNA.

"antecedent summons or information, unless there be "some statutory prohibition, and that upon such "complaint there is jurisdiction to adjudicate, the "danger of surprise being obviated by the power to "apply for an adjournment. The decision in *Reg.* "(*Lalor*) *v. Justices of Queen's Co.* (1), where, on the "return the court refused to quash the conviction, "can only be accounted for on this principle." I submit that although in certain cases, the Betting Act, 1853, does contemplate a summons, if a party is before a magistrate, and he is charged with the commission of an offence, the charge can be proceeded with, without information or summons. *Dixon v. Wells* (2) is strongly in favour of the prosecutor. In that case, Lord Coleridge, C.J., said: "I cannot "disguise from myself the fact that from the language "of many of the judges in *Reg. v. Hughes* (3)— "although perhaps, not necessary for the decision of "the case—and the judgments of Erle, C.J., and "Blackburn, J., in *Reg. v. Shaw* (4), they seem to "assume that if the two conditions precedent of the "presence of the accused and jurisdiction over the "offence were fulfilled, his protest would be of no "avail. It would have been easy to say that a protest "would have made a difference; but I find no such "qualification in *Reg. v. Hughes* (3), although some- "thing like that is said in one of the cases."

If the proper procedure was not adopted in the present case then section 11 of the Betting Act, 1853, is perfectly meaningless. There is nothing in this Act which suggests that a person charged shall only be charged on a summons.

I submit that the ordinary petty sessions procedure is applicable to this Act. The sections prior to section 11 contemplate a summons, but in that section a departure is made. If my contention were not right, section 11 would be absolutely useless.

I submit that the Court should follow the decision of Field, J., in *Rex v. Beech* (5), although he delivered a

(1) 7 Ir.C.L.R. 438.
(2) 25 Q.B.D. 249, 256.
(3) 4 Q.B.D. 614.
(4) 34 L. J. (M.C.) 169.
(5) 1 Ex.D. 320.

dissenting judgment. In any case this Court, being a court of co-ordinate jurisdiction is not bound by *Blake v. Beech* (1). The present case is distinguished from *Blake v. Beech* (1) by the fact that the defendant had ample notice of the charge made against him. *Blake v. Beech* (1) is contrary to numerous decisions in Ireland, where it has always been held that once a prisoner is before the Court, no matter how he has been brought there, the magistrates have power to deal with him.

T. J. Campbell, K.C., E. S. Murphy, K.C., and McSparran for the defendant :—

We submit that a summons is a condition precedent to any proceedings under the Act, charging an offence.

In *Rex v. Garrett-Pegge* (2) Lord Alverstone, C.J., said in his judgment : " I agree that in cases where a " a summons is a condition precedent to the jurisdiction " of the Court of Summary Jurisdiction, as in *Dixon* " *v. Wells* (3), and there is no summons, the justices " cannot proceed."

Section 8 of the Betting Act, 1853, presupposes an information before justices. The proper procedure is by summons. A plea to the jurisdiction is a perfectly proper plea. It is apparent from an examination of the various sections of the Betting Act, 1853, that a person charged shall be charged on information and summons. Section 10 of this Act is quite inconsistent with anything in the nature of a warrant.

We submit that *Blake v. Beech* (1) is perfectly good law and should be followed. Gibson, J., in his judgment in *Reg. (Daly) v. Justices of Cork* (4), mentions *Blake v. Beech* (1) and other cases as having been " referred to without question as authorities in the " leading text-books, and in the several editions of " Smith's Leading Cases." We submit that the law is correctly stated at p. 247 of *Paley on Summary Convictions* (9th edition) as follows : "As was made clear in *Blake v. Beech* (1), " if a defendant objects, he is entitled to re-

(1) 1 Ex.D. 320.
(2) [1911] 1 K.B. 880, 890.
(3) 25 Q.B.D. 249.
(4) [1898] 2 I.R. 694, 697.

K.B.D. 1932.

REX (LOCKHART) v. MCKENNA.

"quire the laying of an information defining the charge "against him ; and if he objects to some irregularity in "the process, or to the ambiguity of the charge, and asks "for time to prepare his defence, he is, in the absence "of exceptional circumstances, entitled to an ad- "journment for that purpose."

[They also referred to *Murphy v. Arrow* (1).]

SIR WILLIAM MOORE, L.C.J.

July 1.

SIR WILLIAM MOORE, L.C.J. : The Statute 8 & 9 Vic., c. 109, which I shall hereafter refer to as The Gaming Act, made it unlawful for any house, room or place to be kept or used as a common gaming house, and by Section 3, if a Justice of the Peace on complaint made before him on oath had reason to suspect that any such house, room or place had been carried on for such a purpose, he in his discretion or power by special warrant under his hand may authorise a constable to enter the premises and arrest, search, and bring before a Justice of the Peace all persons found therein ; and this Act specified the form of such warrant in its first Schedule.

The Betting Act 16 & 17 Vic., c. 119, which I hereafter call The Betting Act of 1853, legislating against betting and other similar purposes, in section 1 declared any house, office, room, or place kept for such purposes to be a common nuisance and contrary to law, and by section 2 declared such place to be a common gaming house within the meaning of the Act of 1845. By section 3 the owner or occupier of such house, on proof being given, was liable on summary conviction before two Justices to certain penalties—a fine up to £100, or imprisonment with the right of hard labour for a period not exceeding six calendar months. Section 11 of the same Statute gave powers corresponding to those sections of the Act of 1845 enabling the Justice to issue a warrant for entry into such suspected premises, and for arrest and search of the persons found therein.

In the present case information was sworn by the Reverend Donald Ross Mackay, of Belfast, Clergyman, that the premises of the defendant, James McKenna,

(1) [1897] 2 K.B. 527.

in 9, Castle Arcade, City of Belfast, were in his belief carried on for the purpose of betting contrary to the provisions of the Act of 1853. This information was made on the 4th of November, 1931. The Resident Magistrate (Mr. H. Toppin) issued a warrant directed to the constabulary reciting the information as being made within the Statute of 1853, and directing them to search the premises and to bring before the Justices of the King the keepers of the same, as also the persons there haunting, resorting and betting, to be dealt with according to law.

From the Case Stated it appears that this warrant was duly executed and the defendant was brought before the Court on the 6th November, 1931, when a charge had been entered up against him in the Police Book for using the said premises for the purpose of betting with persons resorting thereto. (See section 1 of the Act of 1853). The case was adjourned to the 13th November, 1931, when Counsel for Respondent appearing, and after raising several contentions, made the further objection with which this Case Stated is solely conversant, that no summons had been served on the defendant charging him with the offence alleged, a summons being, as Counsel submitted, a condition precedent to any proceedings under the Act where an offence was alleged.

The Court subsequently dismissed the charge without prejudice on the ground that proceedings by information or by summons were conditions precedent to any prosecution under the Statute and required to give them jurisdiction.

We have had the advantage through the courtesy of Mr. P. J. O'Donoghue, R.M., of reading the decision of the Court and their reasons for it.

As argued by Mr. McSparran, the question is whether or not the absence of such information or summons is a ground for dismissing the charge.

We have been referred to a long list of authorities, all of which I have read and considered. I will summarise my conclusions now—

That the defendant may be brought before the Court—

K.B.D. 1932.

REX (LOCKHART) v. MCKENNA.

SIR WILLIAM MOORE, L.C.J.

(*a*) On information with warrant ;
(*b*) On summons ; and
(*c*) If before the Court in any capacity may be dealt with by the Court on any charge, provided a charge is made.

I use these words without restriction once he is lawfully before it, all that is necessary for the Court to have jurisdiction is that a charge to be dealt with must be before it. Apart from the case of felony and apart from the special powers given to constables, there is no power to bring any person before the Court without proceeding in the first instance by methods (*a*) or (*b*). A long list of authorities for this proposition is referred to by Gibson, J., in *Reg.* (*Daly*) *v. Justices of Cork* (1), where he says : " It has been laid down in a number of " cases, of which *Reg. v. Hughes* (2) and *Kennington v.* " *Daniel* (3) are recent examples, that summons is " process, and that where the defendant appears the " complaint may be varied and a new complaint put " forward. In most of these cases there was a tacit " waiver of objection, but the *ratio decidendi* of many " of the Judges seems to affirm that, where the " defendant is present, a complaint may be then and " there made, without any antecedent summons or " information, unless there be some statutory pro- " hibition, and that upon such complaint there is " jurisdiction to adjudicate, the danger of surprise " being obviated by the power to apply for an " adjournment." In *Reg. v. Hughes* (2), a case heard before the Court for Crown Cases Reserved, the whole Court consisting of ten Judges, with one dissentient, held that the defendant was rightly convicted although brought before the Justices and by them convicted. This was a very strong decision, but in that case the charge having been made and the person being before the Court without objection they held that jurisdiction to convict existed. In *Lalor v. Justices of Queen's County* (4), where Lalor was summoned as a witness to prove an assault by Phelan before the Justices, and Phelan pleaded guilty, the Justices then convicted

(1) [1898] 2 I.R. 694, 696.
(2) 4 Q.B.D. 614.
(3) 22 L.R.I. 667.
(4) 7 I.C.L.R. 438.

Lalor who had attended as a witness. Crampton, J., and Perrin, J., made the conditional order of certiorari absolute, and their judgments chiefly deal with the unfairness to the accused; but on the facts of that case it would appear that he was convicted without any charge whatsoever being made. Although these two eminent Judges made the order for certiorari absolute when a return was made to the writ, Lefroy, C.J., on behalf of the Court, refused to make it absolute.

I think Mr. O'Donoghue was perfectly right in his previous view of the law when he says, in his judgment: "Personally I always took the view that the powers "given by this special warrant to the police were "exhausted once the persons found on the premises "searched were before the Court, but I also thought "that once in Court the police might instanter prefer "a charge against any of the persons found com- "mitting an offence under the Act." Mr. O'Donoghue's judgment also refers to a case of *Murphy v. Arrow* (1), and observes that the judgments of Lindley, M.R., and Chitty, L.J., in that case, which was a case under the Betting Act, presupposed the procedure by information or summons such as is here contended for by Mr. Campbell.

In deference to the views of the learned Magistrate, I read these judgments with care but can find nothing in them to support such contention. On the facts I think that this case is a direct authority against the defendant in the present case. It was a prosecution under the Act of 1853 where a warrant was issued, as in the present case, and the appellant and 88 other men were arrested and all were remanded to appear upon recognizances before the Magistrate to be dealt with according to law. Against four of the men so arrested information was subsequently laid and summonses granted for an offence under section 3 of the Act of 1853. On May the 12th three of the men (the keepers) pleaded guilty and were fined; the fourth was discharged; the remainder (being the appellant and 84 other men frequenters) were then before the Magistrate to be dealt with according to law, there

(1) [1897] 2 Q.B. 527.

K.B.D. 1932.

REX (LOCKHART) v. MCKENNA.

SIR WILLIAM MOORE, L.C.J.

being no summons or information in their case, other than the one in which they were arrested, to make the conviction, who bound the parties over under the Statute of Henry VIII not to play, haunt, etc., at any gaming house. It will be noted that although the punishment was under an old Statute, all the proceedings from start to finish, just as in the present case, were under the Act of 1853, and no process or summons to show cause why they should not be bound over was issued to these defendants. A case was stated by the Metropolitan Police Magistrates and the Court held that the persons being before the Court, the Court had jurisdiction so to convict without any further summons or information whatsoever, or indeed any further evidence. This is exactly what Mr. Dougherty has argued before us. I think this case is directly in point. The chief authority relied on by the defendant is the case of *Blake v. Beech* (1), where Cleasby, J. (Grove, J., concurring) decided that it was necessary that an information or summons should be had in the case before them. It will, however, be noted there that the defendant was charged under the Betting Act and that the information and arrest were under the Gaming Act of 1845, and the person was convicted and a penalty was imposed for an offence under the Act of 1853 ; whereas in the present case, information, warrant, arrest, and offence, are all under the later Act. I think the two Judges overlooked the consideration that I have previously set out in this judgment of a concurrent jurisdiction in the justices to deal with any case in respect of which there is a charge before them. Field, J., in an admirable judgment, with which I respectfully concur, laid stress on this doctrine, which was subsequently affirmed in *Reg. v. Hughes* (2) and the later case mentioned by Gibson, J.

I have given every attention to the observations of the Resident Magistrate as to his reading of the judgment in *Blake v. Beech* (2), and it is quite true that section 8 contained provisions for the case of a person convicted on the information of a person before the

(1) 1 Ex.D. 320. (2) 4 Q.B.D. 614.

Justices and also that section 10 provides for the case of a person who does not appear who has made an information. I cannot find it any where in the Act that although proceeding by information and summons are provided for, this is to be the only procedure possible in respect of an offence. I think it must be without prejudice to the admittedly existing jurisdiction of magistrates who deal with any charge legitimately brought against a person before them. We have been referred to the case of *Dixon v. Wells* (1), a decision of Lord Coleridge, C.J., and Matthew, J., which decided that in any prosecution under the Sale of Food and Drugs Act, 1875, a summons must be served subject to certain restrictions in all prosecutions under 38 and 39 Vic., c. 63, and it was held that where these restrictions had not been complied with, as the provisions were imperative and not merely directory, the magistrate had no jurisdiction to convict. I cannot hold that the provisions in the Act of 1853 were imperative or anything more than directory so far as they do go.

SIR WILLIAM MOORE, L.C.J.

I think, therefore, the justices were wrong in point of law in dismissing the case on the ground that the information or summons was a condition precedent, and that it should be remitted to them to proceed according to law. We will consider the question of the costs of this argument.

BROWN, J., having stated the facts, continued: In my opinion the sole question in this case is whether the provisions as to information and summons in the Betting Act of 1853 are mandatory or permissive. The dictum of Erle, C.J., in *Reg. v. Shaw* (2), quoted with approval by Hawkins, J., in *Reg. v. Hughes* (3), seems to me a concise and accurate statement of the law. The Chief Justice said: "In my opinion, if a "party is before a magistrate and he is then charged "with the commission of an offence within the juris- "diction of that magistrate, the latter has jurisdiction "to proceed with that charge without any information

BROWN, J.

(1) 25 Q.B.D. 249.
(2) 34 L.J. (M.C.) 169, 173.
(3) 4 Q.B.D. 614, 627.

K.B.D. 1932.

REX (LOCKHART) v. MCKENNA.

BROWN, J.

"or summons having been previously issued, unless "the statute creating the offence imposes the necessity "of taking some such step."

Does the Betting Act of 1853 impose the necessity of information and summons ?

Section 8 begins : "If any person convicted under "this Act on information before justices . . ."

Section 10 deals with the case of a person who shall have laid any complaint or information and who does not appear to prosecute such information or complaint. The wording of the section is : "It shall be lawful for "such justices to authorize any other person to "proceed on such summons . . ."

Section 11 provides another method by which parties can be brought before the justices ; it gives power to any justice to issue a warrant, in the form prescribed, to arrest and bring before him the keeper as well as all persons found in any house suspected of being a betting house. The parties are then to be proceeded against according to law and it is argued that as against the keeper of the house the procedure must be by information and summons. Support for this argument is sought for in the judgment of the majority of the Court in *Blake v. Beech* (1). In *Reg. v. Hughes* (2), Hawkins, J., says : "I do not look upon *Blake v.* "*Beech* (1) as deciding that the magistrates in the case "then before them had no jurisdiction, but only that "the conviction ought to be quashed for irregularity "under the peculiar circumstances of that case." In the same case Baron Huddleston says that he subscribes to every word of Field's, J., dissenting judgment in *Blake v. Beech* (1).

His Lordship, having read section 14 of the Act, continued : the policy of the Act is clearly shown by this section which provides that on any appeal no objection shall be allowed to the information whereon the conviction has taken place, or to such conviction, on any matter of form or on any insufficiency of statement, provided it shall appear to the justices in quarter sessions that the defendant has been sufficiently informed of the charge intended to be made against

(1) 1 Ex.D. 320. (2) 4 Q.B.D. 614.

him, and that such conviction was proper on the merits of the case.

The provisions in the Act of 1853 as to information and summons seem to me to be permissive or directory only and not mandatory, and therefore I am of opinion that the magistrates had jurisdiction in this case. The case must be sent back to them to proceed according to law.

Solicitor for the complainant : *Chief Crown Solicitor.*
Solicitors for the defendant : *Joseph Donnelly & Co.*

J. M'C.

Spring Assizes. 1932.

BANGOR BOROUGH COUNCIL v. GRAHAM (1).

April 18. *Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52) *ss.* 28, 250, 255, 260—*Summary Proceedings to recover expenses of execution of Works—Private Improvement Expenses—Election of remedy—Expenses payable by annual instalments.*

By section 28 of the Public Health (Ireland) Act, 1878, in case any street be not sewered, etc., to the satisfaction of the urban authority, such authority may require the owners of the adjoining premises to sewer the street, etc., within a time to be specified ; and upon default of the owners the urban authority may execute the works, and may recover in a summary manner the expenses incurred by them in carrying out the work, from the owners in default according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by the Act, or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

Section 255 of the Public Health Act, 1878, provides that the sanitary authority may by order declare any such expenses to be payable by annual instalments within a period not exceeding thirty years with interest as therein provided, and any such instalments and interest may be recovered in a summary manner from the owner or occupier for the time being of such premises, with a similar right, of deduction on the part of the occupier from his rent as in the case of a private improvement rate under the Act.

The plaintiffs in exercise of the powers vested in them under section 28 of the Public Health (Ireland) Act, 1878, served a notice upon the defendant amongst others, requiring him to level, pave and channel a certain lane within thirty-one days. The notice was not complied with and the plaintiffs executed the work themselves, and served upon the defendant a notice of the apportionment of the total expenses incurred upon the work as settled by their surveyor, setting forth the defendant's liability as £38 18*s.* 8*d.* Subsequently the plaintiffs served upon the defendant a demand for payment of this sum. No further step was, however, taken by the plaintiffs to recover this sum by summary procedure, and the claim became statute barred.

The plaintiffs subsequently made an order in purported exercise of the power conferred upon them by the third paragraph of section 255 of the Act, that such expenses should be private improvement expenses and should be payable by two equal half-yearly instalments. Notice of the order was given to the defendant who subsequently

(1) Before Andrews, L.J.

received a demand for payment of the first instalment of £19 9*s.* 4*d.* The defendant did not pay the instalment. The plaintiffs under section 260 of the Act brought a civil bill for its recovery.

Held, by Andrews, L.J., that as the plaintiffs had demanded from the defendant payment of his proportion of the expenses, they had elected to treat the amount due as a debt from him as owner, and that they could not afterwards declare the expenses to be private improvement expenses.

Salford Corporation v. Hale [1925] 1 K.B. 503 distinguished.

Held also, on the authority of *West Ham Local Board v. Maddams* (1 Ex. D. 516) and *Tottenham Local Board v. Rowell* (1 Ex. D. 514) that the limitation of time mentioned in section 250 of the Public Health (Ireland) Act, 1878 (where it is provided that a complaint made in pursuance of the Act must be made within six months from the time when the matter of such complaint arose) applies as well to proceedings in County Courts as in proceedings before Justices.

Held further, that the plaintiffs had no power under section 255 of the Act, or otherwise, to declare the expenses payable by two half-yearly instalments, the power conferred upon them by this section is to declare the expenses payable by annual instalments within a period not exceeding thirty years, and being statutory, it can only be exercised within the strict terms of the statute.

CIVIL BILL APPEAL from a decision of the County Court Judge of Down.

The civil bill was brought to recover the sum of £19 9*s.* 4*d.*, money alleged to be due and payable by the defendant to the plaintiffs under the Public Health (Ireland) Act, 1878, in respect of private street expenses, and in pursuance of an order of the plaintiffs, made under the authority of that Act, dated 15th September, 1931. It was brought under section 260 of the same Act. This section provides that: "proceedings for the recovery of demands within the "jurisdiction of the civil bill court, which sanitary "authorities are empowered to recover in a summary "manner, may at the option of the sanitary authority, "be taken in the civil bill court as if such demands "were debts within the cognizance of such court."

A demand for payment of this sum was made on 21st November, 1931.

The particulars set out in the civil bill averred that this sum of £19 9*s.* 4*d.* sued for was the first instalment of the sum of £38 18*s.* 8*d.* payable under the order, being the amount of the expenses incurred by the

Spring Assizes, 1932.

BANGOR BOROUGH COUNCIL v. GRAHAM.

plaintiffs in levelling, metalling, paving, flagging, channelling and making the lane at rere of north side of Bryansburn Road, Bangor, Co. Down.

The case was one of five which appeared in the Civil Bill Book. Four of these affected the lane at rere of Bryansburn Road, whilst the remaining one was brought to recover an apportioned part of expense incurred upon work in Primrose Street, Bangor. Although the work upon Primrose Street was executed at a considerably earlier date than was the work upon the lane at rere of Bryansburn Road, and certain of the notices and other documents relating to Primrose Street, whilst similar in form, bear an earlier date, it was admitted that a preliminary point taken on behalf of the defendants was common to and equally open to the defendants in all the cases.

On 12th October, 1929, the plaintiffs in exercise of the powers vested in them under section 28 of the Public Health (Ireland) Act, 1878, served a notice upon (amongst others) the defendant, Joseph Graham, the owner of 30 Bryansburn Road, Bangor, requiring him to level, pave, and channel the lane at rere of Bryansburn Road within thirty-one days. The notice was not complied with, and the plaintiffs executed the work themselves, and on 13th June, 1930, served upon the defendant a notice of the apportionment of the total expenses incurred upon the work as settled by their surveyor, setting forth the defendant's liability as £38 18*s.* 8*d.* The apportionment was not disputed, and was followed on 15th October, 1930, by the service on the defendant of a demand for payment of the sum of £38 18*s.* 8*d.* The plaintiff's right, however, to recover this sum by summary procedure, subsequently became statute barred, as no further step was taken for its recovery.

In September, 1931, the plaintiffs decided to resort to other methods of recovering the expenses which they had incurred. They made an order on 15th September, 1931, declaring that in exercise of the power conferred upon them by section 255 of the Act, that the expenses should be private improvement expenses and should be payable by two equal half-

yearly instalments with interest as provided by the section, the payment of the first instalment without interest to be made within one month.

Notice of this order was given to the defendant on 16th September, 1931, and on 21st November, 1931, a demand was made for payment of the first instalment of £19 9*s.* 4*d.* As payment was not made a civil bill dated 21st January, 1932, was brought for recovery of the first instalment.

The County Court Judge of Down dismissed the civil bill, and the plaintiffs appealed from his decision to the Judge of Assize.

It was contended on behalf of the defendant that when the plaintiffs served their notice of demand of 15th October, 1930, they took an irrevocable step by constituting the amount mentioned a debt, and must be held to have definitely elected to proceed under the first of the alternative remedies contained in section 28, and that it was not competent for them, subsequently to proceed by declaring the sum to be private improvement expenses.

Murphy, K.C. (with him *Hume*) for the plaintiffs.

Section 255 of the Public Health (Ireland) Act, 1878, is quite as important as section 28.

We rely on *Salford Corporation v. Hale* (1), where it was held that sub-sections 3 and 4 of section 28 of the Housing, Town Planning, etc., Act, 1919, which provide remedies for the recovery by a local authority from the owner of the expenses incurred by them under the section for the repair of houses necessary to make them reasonably fit for human habitation are not mutually exclusive but cumulative. It was decided in that case that there is nothing to prevent a local authority who have made an order for payment of the full sum under sub-section 3 and failed to obtain payment from subsequently making an order for payment by instalments under sub-section 4.

(1) [1925] 1 K.B. 503.

Spring Assizes. 1932.

BANGOR BOROUGH COUNCIL *v.* GRAHAM.

McGonigal, K.C. (with him *Curran*) for the defendant :—

When the plaintiffs served their notice of demand of 15th October, 1930, they took an irrevocable step by constituting the expenses a debt and must be held to have definitely elected to proceed under the first of the alternative remedies contained in section 28. It was not competent for them afterwards to proceed by declaring the expenses incurred to be private improvement expenses.

The two alternative remedies are (*a*) to recover the expenses in a summary manner, *or* (*b*) to declare the expenses to be private improvement expenses. The presence of the word "*or*" in the third paragraph of section 28 is significant.

We rely strongly on *Wilson v. Bolton Corporation* (1).

Cur. adv. vult.

ANDREWS, L.J.

ANDREWS, L.J. : This was a civil bill heard before me at the last Downpatrick Assizes to recover the sum of £19 9*s.* 4*d.*, money alleged to be due and payable by the defendant to the plaintiffs under the Public Health (Ireland) Act, 1878, in respect of private street expenses, and in pursuance of an order of the plaintiffs, made under the authority of the said Act, dated 15th September, 1931, payment of which sum was demanded from the defendant by the plaintiffs on 21st November, 1931. The particulars set out in the civil bill averred that the sum of £19 9*s.* 4*d.* sued for was the first instalment of the sum of £38 18*s.* 8*d.* payable under the said order, being the amount of the expenses incurred by the plaintiffs in levelling, metalling, paving, flagging, channelling and making good the lane at rere of North side of Bryansburn Road, Bangor.

The case is one of five which appeared in the Civil Bill Book, four of which affected the lane at rere of Bryansburn Road, whilst the remaining one was brought to recover an apportioned part of expense incurred upon work in Primrose Street, Bangor.

(1) L.R. 7 Q.B. 105.

Although the work upon Primrose Street was executed at a considerably earlier date than was the work upon the Bryansburn Lane, and certain of the notices and other documents relating to Primrose Street, whilst similar in form, bear an earlier date, it is admitted that the preliminary point taken on behalf of the defendants before me is common to and equally open to the defendants in all the cases. I shall, therefore, confine my references to the documents relevant to the case of Joseph Graham.

On 12th October, 1929, the plaintiffs, in exercise of the powers vested in them under section 28 of the Public Health (Ireland) Act, 1878, served a notice upon (amongst others) the defendant, Joseph Graham, the owner of 30 Bryansburn Road, requiring him to level, pave, and channel the said lane within 31 days from the date thereof. As such notice was not complied with the plaintiffs executed the work themselves, and on 13th June, 1930, served upon the defendant a notice of the apportionment of the total expenses incurred upon the work as settled by their surveyor, setting forth the defendant's liability as £38 18*s.* 8*d.* Such apportionment was not disputed, and, accordingly, by section 255 of the Act became binding and conclusive on the defendant on the expiration of three months from the service of the notice of apportionment on him, *i.e.*, on 13th September, 1930. This was followed on 15th October, 1930, by the service on the defendant of a demand for payment of the said sum of £38 18*s.* 8*d.* This was undoubtedly a definite step taken by the plaintiffs towards recovery of the amount due by the summary method which constitutes the first limb of the third paragraph of section 28 of the Act of 1878. By section 250 a complaint made in pursuance of the Act must be made within six months from the time when the matter of such complaint arose.

In *Labalmondiere v. Addison* (1), where expenses were incurred by the Commissioners under the Metropolitan Building Act, 1855, in taking down a dangerous structure, such expenses were demanded and refused.

(1) 1 El. & El. 41

Spring Assizes, 1932.

BANGOR BOROUGH COUNCIL v. GRAHAM.

ANDREWS, L.J.

It was held that under section 11 of Jervis's Act (11 and 12 Vict., c. 43), which (for present purposes) contained a precisely similarly expressed period of limitation, the "matter of complaint" was the non-payment of the expenses, and that the time ran from the demand and refusal. The matter is made still more clear by section 255, which expressly provides that in all summary proceedings by a sanitary authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. Accordingly, in my opinion, the plaintiffs' right to recover the £38 18*s.* 8*d.* by summary procedure became statute-barred on 15th April, 1931, as no further step was taken for its recovery prior to that date.

In September, 1931, the plaintiffs appear to me to have recognised that their claim by the summary procedure referred to was statute-barred, and, accordingly, decided to resort to other methods of recovering the expenses which they had incurred. Such method is provided for by the second limb to the third paragraph of section 28, which enacts "or the urban "authority may by order declare the expenses so "incurred to be private improvement expenses." Such order made by the plaintiffs on 15th September, 1931, declared, in purported exercise of the power conferred upon them by the third paragraph of section 255, hereafter more particularly referred to, that the said expenses should be private improvement expenses, and should be payable by two equal half-yearly instalments with interest as therein provided, the payment of the first instalment without interest to be made within one month. Notice of this order was duly given to the defendant on 16th September, 1931, and this was followed on 21st November, 1931, by a demand for payment of the first instalment of £19 9*s.* 4*d.* As such payment was not made the present civil bill, dated 21st January, 1932, was brought for its recovery.

When the expenses incurred in such a work are declared to be private improvement expenses it is

competent for the urban authority under section 229 to make and levy on the occupier a private improvement rate of such amount as will be sufficient to discharge such expenses with interest in such period not exceeding thirty years as the urban authority may determine. This, however, they did not do. They evidently wished to obtain payment in a more speedy manner than is usually contemplated by the striking of a rate. They, accordingly, decided to put into force the power conferred upon them by the third paragraph of section 255 which provides that the sanitary authority may by order declare any such expenses to be payable by annual instalments within a period not exceeding thirty years with interest as therein provided; and any such instalments and interest may be recovered in a summary manner from the owner or occupier for the time being of such premises, with a similar right of deduction on the part of the occupier from his rent as in the case of a private improvement rate under the Act.

The point raised on behalf of the defendant, preliminary to such defence, if any, as he may have upon the merits, is that when the plaintiffs served their notice of demand of 15th October, 1930, they took an irrevocable step by constituting the amount mentioned a debt, and must be held to have definitely elected to proceed under the first of what is submitted to be the alternative remedies contained in section 28, and that, accordingly, it was not competent for them subsequently to proceed by declaring the sum to be private improvement expenses.

The main argument of Mr. McGonigal for the defendant rests on the use of the conjunction "or" between what I have called the two limbs of the third paragraph of section 28—the urban authority may recover the expenses in a summary manner or they may declare the expenses to be private improvement expenses.

Mr. McGonigal supports his argument by reference to the case of *Wilson v. Bolton Corporation* (1), which was decided on the corresponding section of the Public Health Act, 1848. The material portion of that

(1) L.R. 7 Q.B. 105.

Spring Assizes. 1932.

BANGOR BOROUGH COUNCIL v. GRAHAM.

ANDREWS, L.J.

section (§69) provided that "such expenses may be "recovered from the last-mentioned owners in a "summary manner or the same may be declared by "order of the said local board to be private improve- "ment expenses and be recoverable as such in the "manner hereinafter provided." For present purposes that section is precisely similar to section 28 of the Act of 1878. The facts of the case of *Wilson v. Bolton Corporation* (1) are also similar to those of the present case. After notice to the owners street work was executed by the Corporation, the expenses were duly apportioned, and a demand for payment made. Such demand was in my opinion obviously premature, having been served before the expiration of the three months period allowed for disputing the apportionment, but the point was not made, and as it does not apply to the present case it need not be further referred to. The amount so demanded was not paid. Several years later the Corporation declared that the expenses should be private improvement expenses, and by a subsequent order that they should be paid by two annual instalments. In his judgment Lush, J., refers more than once to "the option" which the Corporation had of recovering the expenses in a summary manner or by declaring them to be private improvement expenses; and, whilst not considering it necessary to decide at what time the local board were bound to make their option in cases where they have made no demand on the owner for payment, he was of opinion on the facts of that case that the Corporation did elect to treat it as a debt due from the owner by reason of their having demanded payment within fourteen days. The learned Judge also reserves as unnecessary for his decision, whether, having made the demand, they could afterwards without the consent of the owner, and within nine months from the notice of apportionment before their right was barred, have changed their minds and declared the amount to be private improvement expenses. It was sufficient in his opinion for the decision of the case against the Corporation that they had elected to treat the expenses not as private im-

(1) L.R. 7 Q.B. 105.

provement expenses but as a debt payable by the owner recoverable in a summary way and, having allowed the time for taking summary proceedings to pass, they were after that period precluded from reviving that claim by an order declaring them to be private improvement expenses and therefore recoverable by instalments. In concurring, Hannen, J., said that in his opinion the election as to the mode of proceeding was made when the notice was served on the owner, and the local board adopted a mode of recovering the costs under which, in default of payment, they would be bound to take summary proceedings, they had no longer an option after they had failed from their own dilatoriness to claim the proportion payable in respect of the appellant's premises in a different manner.

It may be said that in Wilson's case (1) proceedings were taken before the justices whereas in the present case proceedings were brought in the County Court under section 260 ; but in my opinion on the authority of *West Ham Local Board v. Maddams* (2) and *Tottenham Local Board v. Rowell* (3) the limitation of time applies as well to proceedings in County Courts as in proceedings before justices.

The principle that the election to proceed under one remedy constitutes a bar to proceedings under another alternative remedy is exemplified by other cases under the Public Health Acts. Thus, where a local board elected to levy an improvement rate it was held that they could not afterwards proceed summarily, *Eddleston v. Francis* (4) ; and, where the preliminary notice intimated that if the owners failed to do the work the sanitary authority would do it and declare the expenses to be private improvement expenses, they were bound by their election and estopped from afterwards taking summary proceedings, *Gould v. Bacup Local Board* (5). So, also, Brett, L.J., was obviously of opinion in *Tottenham Local Board v. Rowell* (6) that a sanitary authority cannot proceed

(1) L.R. 7 Q.B. 105.
(2) 1 Ex.D. 516.
(3) 1 Ex.D. 514.
(4) 3 L.T.N.S. 270.
(5) 44 L.T.N.S. 103.
(6) 15 Ch.D. 378.

Spring Assizes, 1932.

BANGOR BOROUGH COUNCIL v. GRAHAM.

ANDREWS, L.J.

summarily for the entire expenses if they have once made an order under section 255 for payment by instalments.

Mr. Murphy's answer to this argument on behalf of plaintiffs is two-fold. In the first place he contends that Mr. McGonigal's argument rests entirely on section 28 and ignores section 255 of the Act, which is, in his submission, the really important section. I agree that the section is a most important one, as it was under its third paragraph that the Corporation purported to act in declaring the expenses payable by instalments; but the section must be read in conjunction with section 28, and there is nothing in it which would justify any different conclusion from that which I have already expressed as to the alternative character of the remedies provided by section 28, or as to the inability of the Corporation to declare the expenses to be private improvement expenses when they failed to recover them summarily.

In the second place, Mr. Murphy relies strongly upon the recent case of *Salford Corporation v. Hale* (1), in which it was held that sub-sections 3 and 4 of section 28 of the Housing, Town Planning, etc., Act, 1919, which provides remedies for the recovery by a local authority, from the owners, of the expenses incurred by them under the section for the repair of houses necessary to make them reasonably fit for human habitation, are not mutually exclusive but cumulative; and, accordingly, it was decided that there was nothing to prevent a local authority, who have made an order for payment of the full sum under sub-section 3 and failed to obtain payment, from subsequently making an order for payment by instalments under sub-section 4. In my opinion the scheme of sub-sections 3 and 4 is wholly different from section 28 of the Public Health Act, 1878, especially in the omission of the alternative word "or" between the two sub-sections. It was because the Court of Appeal could find no words indicating any option or election to be exercised by the Corporation that they came to the conclusion that the two remedies, both of which were needed in

(1) [1925] 1 K.B. 503.

appropriate cases, were cumulative. Far from throwing any doubt upon the soundness of the decision in *Wilson v. Bolton Corporation* (1) that case, which is distinguished, is recognised to have been rightly decided. In referring to it, Pollock, M.R., says that when the local authority had exercised their option they had lost the right to adopt a different and alternative method. "That," he says, "appears quite "clear from the terms of the statute, which provided "by the word 'or' that the two roads to be followed "should be alternative."

For these reasons I am of opinion that the plaintiffs must fail. At the same time I think it right to add, lest my silence might be misunderstood in another case, that there is, in my opinion, another and more simple answer to the plaintiff's claim which was not relied upon in argument, namely, that the plaintiffs had no power under section 255 or otherwise to declare the expenses payable by two *half-yearly* instalments. The power conferred upon them by section 255, which is the only one they possess, is to declare the expenses payable by *annual* instalments within a period not exceeding thirty years, and, being statutory, it can only be exercised within the strict terms of the statute. The point is not a merely technical one, as an order for payment by half-yearly instalments obviously may, and, if valid in the present case, would have involved the defendants in a liability to discharge the whole debt at an earlier date than would have been possible in the case of payment by annual instalments.

I feel it right to add that the arguments in this case proceeded on the assumption that the declaration of the expenses as private improvement expenses was a necessary or proper preliminary to an order for payment by instalments under section 255. I have, accordingly, dealt with the case on that basis, and have assumed in the plaintiffs' favour that their order was in this respect regular. I wish it, however, to be clearly understood that, in the absence of argument, I express no concluded opinion upon the point which is in my opinion one open to serious argument.

(1) L.R. 7 Q.B. 105.

Spring Assizes. 1932.

BANGOR BOROUGH COUNCIL *v.* GRAHAM.

ANDREWS, L.J.

The dismiss of the learned County Court Judge will be affirmed with costs. [Unrevised.]

Solicitor for the plaintiffs: *W. Irwin Mahaffy.*
Solicitor for the defendant: *Norman Wilson.*

J. M'C.

IN RE ARCHBOLD, DECEASED:

McKEE v. ARCHBOLD (1).

Ch.D. 1932.

May 17.

Will—Construction—Bequest conditional on testator's friends keeping him out of a lunatic asylum.

The testator's will contained the following residuary clause:—

"I bequeath the remainder of my property to my "brother ————, on condition that my friends keep me "out of a lunatic asylum, but if they allow me to be put "into a lunatic asylum, I do then bequeath to the British "Home and Foreign Bible Society the sum of seven hundred "pounds and to my brother ————, I bequeath the "remainder of my property."

About eighteen months after the execution of the will, and five years prior to his death, the testator had been committed to a lunatic asylum on the information of a neighbour and had been detained for a period of one month.

Held, that the condition imposed by the testator was valid, and that in the events which had happened the gift over to the British and Foreign Bible Society took effect.

SUMMONS.

The will of Robert Archbold, of Olphert Place, Coleraine, which was dated 24th March, 1932, contained the following residuary clause:—

"I bequeath the remainder of my property to "my brother, James Archbold, of Pill Box Farm, "Newbury, Mackay, Queensland, on condition that "my friends keep me out of a lunatic asylum, but "if they allow me to be put into a lunatic asylum, "I do then bequeath to the British Home and "Foreign Bible Society, the sum of seven hundred "pounds, and to my brother, James Archbold, of "Newbury, Mackay, Queensland, I bequeath the "remainder of my property."

On 6th August, 1926, the testator was committed to Londonderry Lunatic Asylum on the information of a neighbour, and was detained there for a period of one month. He died on 19th June, 1931, and probate of

(1) In the Chancery Division before Megaw, J.

Ch.D. 1932.

ARCHBOLD, DECD.; McKEE v. ARCHBOLD.

his will was granted to James R. McKee and Joseph McAfee, who brought the present summons for the determination (*inter alia*) of the question as to whether in the events which had happened, and on the true construction of the will, the words: "on condition "that my friends keep me out of a lunatic asylum, but "if they allow me to be put into a lunatic asylum . . ." constituted a valid condition capable of taking effect.

Cooke for the executors.

Black, K.C., for James Steel (Treasurer of the British and Foreign Bible Society).

There is nothing to render the condition invalid. The deceased was committed to a lunatic asylum under section 10 of the Lunacy (Ireland) Act, 1867. This section contains a provision which would have enabled any relation or friend to take him under his own care and protection and thus have prevented his committal.

[He referred to *Shewell v. Dwarris* (1).]

Chambers for the defendant, James Archbold.

The condition which the testator sought to impose should not be treated as valid. Not only was James Archbold unaware of the condition contained in the will, but he was out of the jurisdiction, and was thus not in a position to prevent his brother's committal.

Dougherty for the Attorney-General.

MEGAW, J.

MEGAW, J.: Although the terms of this will are absurd, I have to assume for the purpose of these proceedings that it is the will of a sane person. Reading the document as it stands, the only conclusion to which I can come is that there was a gift to James Archbold on condition that the testator's friends kept him out of a lunatic asylum. In my opinion this was a condition precedent. There was no gift unless this condition was found to be fulfilled at the death of the testator, though, so far as I can see, it would have

(1) Johns, 172.

been impossible for the legatee, who lived in Australia, to have taken any effective steps as regards the testator, even if he had known that a legacy depended on such action. The condition "that my friends "keep me out of a lunatic asylum" is absolute, though not necessarily dependent on the legatee's conduct.

The testator's "friends," however they may be defined, did not keep him out of a lunatic asylum and consequently I am obliged to hold that the gift does not become operative and that the bequest of seven hundred pounds to the British and Foreign Bible Society takes effect.

Solicitors for the plaintiffs: *Macauley, O'Neill & Martin.*

Solicitors for the defendant, James Steel: *Martin H. Turnbull & Co.*

Solicitors for the defendant, James Archbold: *Anderson & Co.*

Solicitor for the Attorney-General: *Hume Babington.*

J. D. C.

BIBL. LONDIN. UNIV.

Ch.D. 1932.

Feb. 23, 24, 25, 26. March 4.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 RURAL DISTRICT COUNCIL (1).

Injunction—Erection of Public Lavatory on Highway—Nuisance—Ultra Vires—Delay in instituting proceedings—Acquiescence and Laches—Laches of Relator, whether attributable to Attorney-General.

The defendants resolved that a public lavatory should be provided for the town of R., and decided to apply to the Ministry of Home Affairs to be invested with urban powers under section 1 of the Public Health (Ireland) Act, 1896, in order that they might put into force the provisions of section 49 of the Public Health (Ireland) Act, 1878.

An inquiry was held by the Ministry of Home Affairs to consider the propriety of the site selected by the defendants.

The Ministry issued a sealed order, in which without specifying or expressly approving of any particular site, they declared the provisions of section 49 of the Act of 1878 to be in force within the limits of the contributory place referred to in a deposited map ; and invested the defendants with the powers of an urban council under section 49 to be exercised within the limits of their area. The defendants held a special meeting to consider the Ministry's Order, when their assistant clerk informed them that they could now proceed with the erection of the public lavatory. The assistant clerk was directed to communicate with the secretary of the County Council to obtain their permission to have the public lavatory erected on the proposed site. The assistant clerk saw the clerk and was informed by him that the terms of the Ministry's Order made it unnecessary for the defendants to obtain the County Council's permission, so when the assistant clerk wrote to the secretary of the County Council, he did not ask for any permission as he had been directed to do, but merely stated that the defendants had been invested with urban powers for the purpose of erecting the lavatory, and that the site on which it was proposed to erect it, was that proposed by the defendants at the Inquiry which had been held. No reply was sent to this letter by the County Council, and no action was taken upon it. Subsequently tenders for the execution of the work were accepted, and the defendant's clerk wrote to this effect to the secretary of the County Council, and stated that the work would be proceeded with at the earliest possible date. No reply was sent, nor was any action, taken upon this letter by the County Council. For more than three months after the receipt of the first

(1) In the Chancery Division before Andrews, L.J., sitting for Megaw, J.

letter from the assistant clerk of the Rural District Council, which was written on 30th May, 1930, and which stated that the defendants had been invested with urban powers for the purpose of doing this work, the County Council were absolutely inactive. The defendants subsequently accepted a tender for the erection of the structure. The defendant's clerk wrote to the secretary of the County Council on 28th June, 1930, informing him of this fact and stating that the work would be proceeded with at the earliest possible moment. On 13th September, 1930, the secretary of the County Council wrote to the defendant's clerk pointing out that the Order did not absolve the defendants from the obligation of obtaining the sanction of the County Council, and that as such sanction had not been obtained, he warned the defendants not to proceed further with the erection of the structure.

Proceedings were subsequently brought by the Attorney-General at the relation of the County Council of Down, and by the County Council for a declaration that the defendants had wrongfully obstructed the public highway by erecting a public lavatory, and for a mandatory injunction to compel the defendants to pull down the structure and restore the highway.

Held, by Andrews, L.J., that the delay on the part of the County Council had disentitled them to an injunction, but that the laches of a relator is not necessarily to be attributed to the Attorney-General, and while delay on his part with knowledge of the alleged violation of his rights cannot be ignored, there was no sufficient evidence of the Attorney-General's knowledge of the infringements of the rights of the public to justify a refusal of the mandatory injunction.

ACTION for a declaration that the defendants had wrongfully obstructed the highway by erecting a public lavatory, and for a mandatory injunction to compel them to remove the structure and restore the highway.

The defendants whose jurisdiction extends over the town of Rathfriland, resolved at a public meeting on 22nd August, 1929, that a public lavatory should be provided for the town of Rathfriland. They applied to the Ministry of Home Affairs to be invested with urban powers under section 1 of the Public Health (Ireland) Act, 1896, so that they might put in force the provisions of section 49 of the Public Health (Ireland) Act, 1878.

There was serious difference of opinion with regard to the proposed site of the structure. The County Surveyor wrote to the defendants' clerk stating that as the structure would be an obstruction on the public

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

road, the consent of the County Council would be required.

As the result of an Inquiry held by the Ministry of Home Affairs, a sealed Order was issued, dated 9th April, 1930. The Ministry, without expressly approving of any particular site, declared the provisions of section 49 of the Act of 1878 to be in force within the limits of the contributory place referred to in a deposited map, and invested the defendants with the powers of an urban council under section 49 to be exercised within the limits of the area.

The defendants held a special meeting on 22nd May, 1930, to consider the Ministry's Order when their assistant clerk informed them that everything was now in order to proceed with the erection of the lavatory. It was decided to advertise for tenders, and the assistant clerk was directed to communicate with the secretary of the County Council to obtain their permission to have the lavatory erected on the proposed site. The site selected by the defendants was in the Square at Rathfriland.

The assistant clerk saw the clerk, who was unwell, a short time after the meeting and was informed by him that the terms of the Ministry's Order made it unnecessary for the defendants to obtain the County Council's permission; and accordingly, when the assistant clerk wrote to the secretary of the County Council on 30th May, he did not ask for any permission as he had been directed to do, but merely stated that the defendants had been invested with urban powers for the purpose of erecting the lavatory and that the site on which it was proposed to erect it was the one put forward by the defendants at the Inquiry.

No action whatever was taken by the County Council with regard to this letter, and no reply was sent to the defendants. Subsequently a tender for the erection of the structure was accepted by the defendants, and the defendants' clerk wrote to the secretary of the County Council on 28th June, informing him of this fact, and added, "The work will "be proceeded with at the earliest possible date." The receipt of this letter was admitted, but no reply

was sent nor other action taken by the County Council upon it.

On 25th August the local Member of Parliament wrote to the Ministry objecting to the proposed work, and on 29th August a copy of this letter was forwarded by the Ministry to the defendants. The letter was considered by the defendants at a meeting held on 4th September, when a resolution was passed defending their action, and stating that the objections raised were believed to be of a personal character and unworthy of serious consideration. A deputation on behalf of the Town Committee visited the Ministry of Home Affairs and protested against the erection of the structure. During all this time the County Council were absolutely inactive.

On 12th September, however, the secretary of the County Council wrote to the defendants' clerk pointing out that the Order of the Ministry did not absolve the defendants from the obligation of obtaining the sanction of the County Council, as Road Authority, to the site of the proposed structure, and that as the sanction of the County Council had been neither asked for nor given, he had to warn the defendants not to proceed further with the erection of the structure.

The defendant's clerk replied that, believing that no objection would come from any quarter they proceeded with the work. They would not, he stated, have gone on with the work after the Ministry empowered them to do so if they had been favoured with a timely intimation from the County Council that the latter's assent was necessary and would be withheld. The work of erecting the structure had proceeded during this time until the contractor was stopped by the architect on 15th November, when only a week's work was required for completion

No step was taken during all this period by the issue of a writ or an application for an interlocutory injunction. The County Council authorised proceedings on 6th November, but it was not until 5th January, 1931, that the writ in the action was issued. The statement of claim was not delivered until 22nd May. After one notice of trial served in December

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

had been allowed to lapse owing to the case not being set down for trial, a new notice of trial was not served until 11th February, 1932.

The *Attorney-General* (*A. B. Babington, K.C.*) and *E. S. Murphy, K.C.* (with them *Warnock*) for the plaintiffs :—

From 1898 to the present time these roads were vested in the County Council, the Rural District Council have no jurisdiction over the highway. The bed and soil of the highway would remain in the adjoining owner, the street would vest in the County Council.

Clause 15 (1) of the Local Government (Application of Enactments) Order, 1898, provides that all property of the grand jury of a county, shall pass to and vest in and be held in trust for the council of the county.

Section 1 (3) of the Local Government (Roads) Act (Northern Ireland), 1923, provides that no application shall be made to, nor shall any proceedings be taken by, a rural district council in connection with the maintenance of a road situate in their distirct, if the road is classified as a first class road or as a second class road. This road was classified as first class in the Gazette of 12th December, 1923.

The Order made by the Ministry of Home Affairs does not purport to bind the County Council. We submit that the Ministry would not have had power to bind the County Council as Road Authority. It is stated in Vanston's Public Health (second edition) that unless the urban authority have property of their own whereon to erect conveniences, they cannot do so under the Public Health (Ireland) Act, 1878. *Baird v. Mayor of Tunbridge Wells* (1), in House of Lords, *Mayor of Tunbridge Wells v. Baird* (2).

We submit that the Order gave the defendants no power to erect the lavatory on the site selected by them. The defendants were well aware that it was necessary that the permission of the County Council should be obtained. The onus was upon the defend-

(1) [1894] 2 Q.B. 867. (2) [1896] A.C. 434.

ants to get the permission to sanction the illegality. There was no mistake in the present case. The defendants relied on the order that they had obtained. Nothing that the County Council did or failed to do, induced the defendants to proceed. This doctrine of standing by is based on the proposition that a man is not to be defrauded of his legal rights unless he has acted in such a way as to make it fraudulent for him to set them up.

In *Willmott v. Barber* (1) Fry, J., said : "It has been "said that the acquiescence which will deprive a man "of his legal rights must amount to fraud, and in my "view that is an abbreviated statement of a very "true proposition. A man is not to be deprived of "his legal rights unless he has acted in such a way "as would make it fraudulent for him to set up those "rights." In *Proctor v. Bennis* (2), Cotton, L.J., said : "It is necessary that the person who alleges this "lying-by should have been acting in ignorance of the "title of the other man, and that the other man should "have known that ignorance and not mentioned his "own title." We submit that the doctrine of acquiescence does not apply to the facts of the present case.

T. J. Campbell, K.C.; A. Black, K.C., and *W. Johnson*, for the defendants :—

In *Roberts v. Gwyrfai District Council* (3), Lindley, M.R., said that if the defendants desired to apply to Parliament to authorize them to do what they were doing, the Court would suspend the operation of an injunction. In *Rex v. Bartholomew* (4), the defendant unlawfully erected and maintained in the middle of the roadway of a public street a coffee-stall. The stall was of a permanent character, having gas and water laid on to it from the mains, and being assessed to the rates at £32. There was sufficient room for the passage of traffic up and down the street on either side of the stall. On an indictment of the defendant for a nuisance in thereby obstructing the highway, the jury

(1) 15 Ch. D. 96, 105.
(2) 36 Ch. D. 740, 760.
(3) [1899] 2 Ch. 608, 615.
(4) [1908] 1 K.B. 554.

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

found that the coffee-stall was an obstruction, but that it did not appreciably interfere with the traffic in the street. It was held that the findings did not justify the entry of a verdict of guilty.

The fact that there had been only one accident in eighteen months did not suggest that the structure was a danger to traffic.

The County Council have a right of veto by reason of their interest in the highway, if their right is not waived, the Rural District Council not having obtained an order under the Act of 1907. We contend, however, that by their conduct the County Council had waived their rights. Waiver is covered by a plea of acquiescence.

[ANDREWS, L.J.: I do not think so. The plea of waiver is distinct from that of acquiescence, and the plea of acquiescence is distinct from that of laches.]

In *Reg. v. Lepine* (1), upon an indictment tried upon the civil side at the assizes, for a nuisance to a highway by an obstruction, the jury found that a portion of the site of the chapel mentioned in the indictment, and of the land enclosed by iron railings also mentioned in the indictment, to the extent in the whole of 187 feet, was part of the parish highway, but that the obstruction to the public was inappreciable. It was held that such a finding amounted to "not guilty," and such verdict having been directed by the judge who tried the indictment, to be entered, the court refused to disturb it.

In *Attorney-General v. Birmingham, Tame,* and *Rea District Drainage Board* (2), Lord Robson in his speech in the House of Lords, expressed the view that in an action by the Attorney-General complaining of a breach of a public statute by a public body the Court is not bound on proof of the breach, to grant an injunction, but may allow the defendants a reasonable time within which to comply with the statute.

The Court of Chancery will not grant an injunction unless the matter is substantial. The County Council had acquiesced to all appearances, and for a great

(1) 15 L.T. (N.S.) 158. (2) [1912] A.C. 788.

length of time took no steps to assert their rights. In Kerr on Injunctions (sixth edition) the law is thus stated: "The mere objection to, or a mere protest "on the part of the plaintiff against, the act of the "defendant, or a mere threat to take legal proceedings "is not in general sufficient to exclude the consequence "of laches or acquiescence. Nor will the continual "assertion of a claim unaccompanied by any act to "give effect to it, keep alive a right which would be "otherwise precluded."

In *Birmingham Canal Co. v. Lloyd* (1) an injunction against drainage, preparatory to opening a coal mine, with prejudice to a canal, before establishing the right at law, was refused, the plaintiffs not having applied, until nearly two years after the notice was received. We rely on *Wicks v. Hunt* (2), which is a case of laches, where it was held that the fact that no serious damage had been done in the interval while certain works were in progress, did not excuse the plaintiff's delay.

On the question of the position of the Attorney-General we rely on *Attorney-General v. Birmingham, Tame* and *Rea District Drainage Board* (3), where it was held that the Attorney-General, complaining that a public body is committing an offence against a statute, is not entitled as a matter of right, on proving his case to an injunction. We rely on the words used by Cozens-Hardy, M.R., in his judgment in that case at page 53. We also rely on the words used by Farwell, L.J., in his judgment.

In *Attorney-General v. Grand Junction Canal Company* (4), it was held that with respect to the action by the Attorney-General, the Court had a discretion as to granting a mandatory injunction in such a case, and having regard to the length of time which had elapsed without objection or complaint, no such injunction ought to be granted. In that case, Joyce, J., said in his judgment, "I am of opinion, and I decide, that in "such a case as the present, whether the Attorney-"General be barred by laches or not, at all events with

(1) 18 Ves. 515.
(2) Johns 372.
(3) [1910] 1 C.h 48.
(4) [1909] 2 Ch. 505, 517, 518.

"respect to relief by injunction, especially by man-
"datory injunction, the Court has at least a discretion,
"and ought to have regard to the very long period of
"time which has elapsed without objection being taken
"or complaint made to the costly works that were
"originally constructed and have since been main-
"tained at considerable expense."

We rely strongly on the words used by Turner, L.J., in *Attorney-General v. Sheffield Gas Consumers' Co.* (1), where he said: "That delay will affect the Attorney-
"General as much as a private individual I am not
"prepared to say; but, in my opinion, it is a circum-
"stance to be considered in determining the question
"whether this Court should interfere, although the
"application to the Court be on behalf of the Attorney-
"General, and I ground myself in that opinion upon
"what fell from Lord Eldon in the case of *Attorney-*
"*General v. Johnson* (2). In that case Lord Eldon
"distinctly states his opinion to be that delay is to be
"considered in determining a question of injunction,
"though the application may be by the Attorney-
"General on behalf of the public."

We contend (*a*) that this is a trial action and ought never to have been brought by one public authority against another, (*b*) that there is no serious obstruction, and (*c*) if a mandatory injunction is granted, its operation should be suspended.

[They also referred to *Attorney-General* (on Relation of Seisdon Rural District Council) *v. South Staffordshire Waterworks Company* (3)]

Murphy, K.C. (in reply):—

The site of the erection is at the most congested point. We rely on the words used by Palles, C.B., in *Clements v. Tyrone Co. Council* (4), as to the liabilities of those who without statutable authority place obstructions upon a public road.

In *Attorney-General v. Mayo County Council* (5), it was held that a county council cannot legally sanction

(1) 3 D.M. & G. 304.
(2) 2 Wils. Ch. 87.
(3) 25 T.L.R. 408.
(4) [1905] 2 I.R. 415, 423.
(5) [1902] 1 I.R. 13.

the erection of a permanent structure not authorised by the necessities of the public service, along or upon a county road, and that the Attorney-General, as representing the public, is the proper person to prevent this by injunction. It was also held in that case that an obstruction placed upon a county road can only be looked on as inappreciable when the obstruction is temporary in character, or where it is so small in extent that it could not, under any circumstances, impede traffic. The decision in *Baird v. Mayor of Tunbridge Wells* (1), does not cover the present case. *Roberts v. Gwyrfai District Council* (2) is not comparable with the case that is being argued. It is recognised in all the cases that the position of the Attorney-General in a relator's action differs fundamentally from that of a private individual. *Attorney-General v. Scott* (3) is more clearly analogous to the present case than any of the cases that have been referred to. The principle that laches does not apply in a relator action is recognized in several cases. The elements that go to make up estoppel are correctly summarised in Halsbury, Vol. 13, page 167, par. 201.

ANDREWS, L.J. : In this case the Attorney-General for Northern Ireland (at the relation of the County Council of Down) and the County Council of Down sued the Newry No. 1 Rural District Council for a declaration that the defendants have wrongfully obstructed the public highway at the Square, Rathfriland, by erecting a public sanitary convenience thereon, and for a mandatory injunction to compel the defendants forthwith to remove and pull down the structure and to restore the highway. The defence, in addition to traverses, relied as justification for the defendants' action upon the authority alleged to have been conferred upon them by an Order made on 9th April, 1930, by the Ministry of Home Affairs for Northern Ireland, consequent upon a public Inquiry. The defendants further pleaded laches and acquiescence.

(1) [1894] 2 Q.B. 867.
(2) [1899] 2 Ch. 608.
(3) [1905] 2 K.B. 160.

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN *v.* NEWRY No. 1 R.D.C.

ANDREWS, L.J.

The issues became narrowed at the hearing. After evidence had been given by Mr. Wilkin, the County Surveyor, and Mr. Parkinson, the Assistant Surveyor, Mr. Campbell admitted on behalf of the defendants that the place where the sanitary convenience had been erected was a public highway; and in opening the defence he was further compelled to admit that the Order of the Ministry could not be relied on as constituting *per se* a legal defence to the action; but he submitted that it was relevant on the exercise of judicial discretion in regard to the issuing of a mandatory injunction.

The relevant facts may be briefly stated. Rathfriland is a town of approximately twelve hundred inhabitants, situate in a somewhat densely populated rural district. Markets and fairs are held with great frequency in the Square, and are largely attended by farmers and others who come to Rathfriland from the surrounding country districts. The necessity for a public sanitary convenience was admitted, and the *bona fides* of the defendants in its erection was not challenged. There can be no doubt that purely from the standpoint of convenience the Square was the natural and proper place in which to erect it, not only because the markets and fairs are held there, but also because it is the centre of the town and constitutes a terminus for a considerable number of buses, which make journeys to Belfast and other towns.

The public affairs of Rathfriland are controlled by the defendants, a Rural District Council. As such they had no powers to erect a public convenience. Accordingly, when they resolved at a meeting on 22nd August, 1929, that "a public lavatory be pro-"vided for the town of Rathfriland on a site to the "northern side of the courthouse" (*i.e.*, in the Square), they decided to apply to the Ministry of Home Affairs to be invested with urban powers under section 1 of the Public Health (Ireland) Act, 1896, in order that they might put in force the provisions of section 49 of the Public Health (Ireland) Act, 1878.

Acute controversy soon arose in regard to the proposed site on the north end of the Square. A town

committee, which had been in a dormant condition for years sprang into life in opposition to the site. Dr. Speedy, the Medical Officer of Health, reported against it on several grounds, included in which was the fact that the convenience would be positively dangerous owing to the congestion at this spot with traffic and other existing structures—a pump, two watering troughs (one a fountain), and the breathing pipe of a sewer. Still more important from the point of view of this action was the attitude of the County Surveyor, Mr. Wilkin, who on the day upon which he received notice of the date of the proposed Inquiry from Mr. Bell, the clerk of the defendants, wrote to him saying that as the convenience would be an obstruction on the public road, the consent of the County Council would be required.

The Inquiry was duly held on 31st January, 1930, when the County Council were represented by their solicitor, Mr. Martin, in opposition to the proposal. The real, in fact, the only point contested at the Inquiry was the propriety of the particular site proposed. The necessity for the convenience was admitted on all sides. After more than two months the Ministry issued their sealed Order, dated 9th April, 1930, in which, without specifying or expressly approving of any particular site, they declared the provisions of section 49 of the Act of 1878 to be in force within the limits of the contributory place referred to in a deposited map ; and invested the defendants with the powers of an urban council under section 49 to be exercised within the limits of the said area.

The defendants held a special meeting on 22nd May to consider the Ministry's Order, when their assistant clerk informed them that everything was now in order to proceed with the erection of the convenience. It was decided to advertise for tenders ; and, according to the signed minutes, which I accept as a correct record of the proceedings, the assistant clerk was directed to communicate with the secretary of the County Council to obtain their permission to have the convenience erected on the proposed site. Apparently, the assistant clerk saw the clerk, Mr.

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

ANDREWS, L.J.

Bell, who was unwell, a short time after the meeting and was informed by him that the terms of the Ministry's Order made it unnecessary for the defendants to obtain the County Council's permission; and, accordingly, when the assistant clerk wrote to the secretary of the County Council on 30th May he did not ask for any permission as he had been directed to do, but merely stated that the defendants had been invested with urban powers for the purpose of erecting the convenience, and that the site on which it was proposed to erect it was the one put forward by the defendants at the Inquiry. This letter was submitted by the secretary at a meeting of the Finance, Law and Parliamentary Committee of the County Council on 6th June, but no action whatever was taken upon it and no reply was sent to the defendants. Accordingly, when the defendants met on 26th June to consider tenders for the erection of the convenience, that of a Mr. Alex. Malcomson for Two hundred and ninety-seven pounds ten shillings was accepted; and the defendant's clerk, who had apparently returned to work, wrote to the secretary of the County Council on 28th June informing him of this fact, and added :— "The work will be proceeded with at the earliest "possible date." The receipt of this letter is admitted, but no reply was sent nor other action taken by the County Council upon it.

The contract for the work was duly completed with sureties on 11th July, the period of ten weeks for the completion of the work having been first altered to three months. The commencement of the work was delayed owing to other work which the contractor had in hands; and it was not until the last week of August that the foundations were commenced. Next followed a few days' delay owing to a public meeting being held in the town on the last Saturday of August, followed by a fair or market on 3rd September, and work was not resumed until 4th September. Apparently Mr. Robert McBride, the local Member of Parliament, had written on 25th August to the Ministry objecting to the proposed work, and on 27th August a copy of this letter was forwarded by the Ministry to the defendants.

This letter was considered by the defendants at a meeting on 4th September when a resolution was passed defending their action, and stating that the objections raised were believed to be of a personal character and unworthy of serious consideration. Meanwhile, Mr. McSpadden, one of the honorary secretaries of the town committee, had returned from his holidays on 1st September, and, seeing that work had commenced, he arranged for a deputation to go to the Ministry of Home Affairs on 8th September. Following this, another official of the Ministry visited Rathfriland, but nothing definite resulted. During all this time the County Council were absolutely inactive ; and, in view of the letters which they had received from the defendants, coupled with the notification of the acceptance of a tender and the actual commencement of the work, the complete silence of the County Council, their Law Committee, and their officials is only consistent to my mind with the existence of a feeling of complete indifference on the subject. This was not altogether unnatural, as Colonel Gordon, who was member of the County Council for the District until May or June, 1930, favoured the scheme. Mr. McSpadden, however, became his successor, and, taking a different view of the matter, he requested the secretary to put the matter on the agenda of the Law Committee for their meeting to be held on 12th September. It was obviously as a result of his efforts that the secretary of the County Council wrote to the defendants' clerk on 13th September pointing out that the Order of the Ministry did not absolve the defendants from the obligation of obtaining the sanction of the County Council, as Road Authority, to the site of the proposed structure, and that as the sanction of the County Council had been neither asked for nor given, he had to warn the defendants not to proceed further with the erection of the structure.

Mr. Bell replied that the structure was in course of erection and would be completed in a very short time, as on the previous Wednesday it was ready for the roof. He asserted the defendants' unanimous opinion that no dangerous obstruction would be caused to the

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

ANDREWS, L.J.

public traffic; and, with reference to the obligation to obtain the sanction of the County Council, he relied upon the letters of 30th May and 28th June, to which I have already referred. Much of this letter was repeated in a further letter written by Mr. Bell on 27th September, which contained the additional intimation by direction of the defendants that if the County Council had any legal objection to the carrying out of the work, there was ample time given to raise the objection. Further correspondence followed, in the course of which on 7th October Mr. Bell said that the defendants were very strongly of opinion that the County Council should waive any objection to the erection of the structure. Finally, in his letter of 27th November, after recapitulating the facts, including the absence of any reply to the letters of 30th May and 28th June, Mr. Bell wrote that, believing that no objection would come from any quarter, they proceeded with the work. His Council, he continued, would not have so proceeded if at the Inquiry the County Council had raised the point that they now raised (*i.e.*, the necessity for the County Council's consent); and, further, they would not have gone on with the work after the Ministry empowered them to do so if they had been favoured with a timely intimation from the County Council that the latter's assent was necessary and would be withheld.

Meanwhile, work had proceeded at the public convenience until the contractor was stopped by the architect on 15th November, when only a week's work was required for completion. No effective step was taken during all this time by the issue of a writ or application for an interlocutory injunction; and, although the County Council ultimately authorised proceedings on 6th November, it was not until 5th January, 1931, that the writ in the present action was issued. Proceedings continued in a most lethargic fashion, the statement of claim, which was of the most simple character, not being delivered until 22nd May; and, ultimately, after one notice of trial served in December had been allowed to lapse owing to the case not being set down for trial, a new notice of trial was

not served until 11th February, 1932, so that the case, which demanded expedition in the public interest, did not come on for trial until almost one and a half years after the contractor had been ordered to cease work. None of these facts can be ignored, as both acquiescence and laches have been pleaded.

Since the hearing of the action by me last week I had the advantage of visiting Rathfriland, and my inspection confirmed in every respect the conclusions at which I had provisionally arrived on the evidence given before me in Court, and renders it wholly unnecessary for me to consider the evidence in detail. I hold as a fact that the plaintiffs wholly fail in so far as they have attempted to establish that the erection of the convenience has caused an obstruction to traffic by diverting it to one side or other. This diversion is of the most nominal and trivial character amounting at most on the limited occasions on which traffic might have passed over the site to a matter of three or four yards, and there is ample space for all normal traffic on all sides of the convenience. I need not deal with abnormal traffic on fair and market days when congestion has always been such as to make traffic in the ordinary sense impossible. On the other hand, I am clearly of opinion that the convenience in its present site constitutes an obstruction to the line of vision for approaching traffic which might increase in a small measure the already existing dangers of this, which is admittedly the most congested area in Rathfriland. Let me say at once that I disregard as wholly immaterial from the strictly legal standpoint the argument that if this convenience were removed, matters would not be improved, as the site would probably be availed of as a stand for buses. I admit that a bus, of which I saw several during my visit, constitutes almost as great an obstruction as the convenience ; but the possible substitution of another temporary or occasional obstruction does not justify the retention of an existing obstruction of a permanent character. This obstruction mainly exists for vehicles travelling along the west side of the Square in a northerly direction, as the convenience intercepts the

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

ANDREWS, L.J.

line of vision of traffic emerging from Main Street. In my opinion this obstruction is more than nominal or trivial; but it is not serious or substantial. I think I would best describe it as slight yet appreciable. It is upon these findings on the questions of fact that I turn to consider the legal issues involved. In doing so it will be necessary to bear in mind the respective rights of the Attorney-General, who sues with the County Council as relator, and of the County Council who sue as separate plaintiffs.

In the first place, I am clearly of opinion that an obstruction on the public highway of the character and extent which I have indicated constitutes an actionable wrong which a Court of Equity may compel the wrongdoer to remove through the medium of its special jurisdiction to issue a mandatory injunction. Thus Sir G. J. Turner, L.J., in *Goldsmid v. Tunbridge Wells Improvement Commissioners*, (1) expressed the clear opinion that, though the Court ought not to interfere in cases in which the injury is merely temporary and trifling, it ought to do so in cases in which the injury is permanent and serious. The obstruction in the present case is, as I have already indicated, neither temporary nor trifling.

The question which, accordingly, arises for decision is whether the plaintiffs or either of them have been deprived of their *prima facie* rights by any of the facts relied upon by the defendants in this case. The pleas relied upon are acquiescence and laches. Personally, I think that at least an equally appropriate plea would have been waiver, which is the abandonment of a right. Such abandonment may be express, or, if the person entitled to the right so conducts himself that it would be inequitable to enforce it, waiver may be implied. Waiver, no doubt, depends on consent, but the fact that the other party has acted upon it is sufficient consideration. No point, however, is made by Counsel for the plaintiffs upon the absence of a plea of waiver, as it is admitted to be difficult sometimes to say what are the niceties of distinction between waiver on the one hand and acquiescence and laches on the other.

(1) L.R. 1 Ch. App. 349.

Referring to acquiescence in *Leeds* (*Duke*) *v. Amherst* (*Earl*) (1), Lord Cottenham, L.C., said: "If a party having a right stands by and sees another "dealing with the property in a manner inconsistent "with that right, and makes no objection while the "act is in progress, he cannot afterwards complain. "That is the proper sense of the word 'acquiescence.'" The learned Attorney-General referred me to the frequently cited judgment of Fry, J., in *Willmott v. Barber* (2), in which, he points out that the acquiescence which will deprive a man of his legal rights must amount to fraud, and enunciates all the elements which must exist to establish fraud of a nature which will entitle the Court to restrain the possessor of a legal right from exercising it. In applying those tests we must remember that Fry, J., refers to the defendant as the possessor of the legal right, whereas in the present case the legal rights were enjoyed by the plaintiffs. Bearing this in mind, there is much to be said for the view that all the essential conditions laid down by Fry, J., are fulfilled in the present case. Thus it is contended that the defendants made a mistake as to their legal rights, misinterpreting the Order of the Ministry, on the advice of their clerk, as an authorised determination in favour of this particular site; that the defendants expended money on the faith of this belief; that the plaintiffs knew of their rights and of the defendants' mistaken belief of their rights; and, lastly, that they must have encouraged the defendants in their expenditure by abstaining from asserting their legal rights. As against this view it is argued that in Mr. Wilkin's first letter of 7th January, 1930, he pointed out in the most explicit terms that the proposed convenience would be an obstruction on the public road, and that, accordingly, the consent of the County Council would be required. This clear statement as to the County Council's attitude was never expressly withdrawn; and the objection of the County Council to the proposed site was maintained by argument and evidence at the Inquiry. It is also to be remembered

(1) 2 Ph. 117, 123. (2) 15 Ch.D. 96, 105, 106.

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

ANDREWS, L.J.

that the County Council's belated protest in September came before much of the work had been done. From that date any misapprehension caused by the County Council's silence and inaction was removed, and the defendants proceeded at their own peril. These latter considerations have prevailed with me to the extent that I feel it would be safer not to hold the County Council barred of relief by the doctrine of acquiescence.

At the same time, I am clearly of opinion that on the facts of this case the County Council, as distinguished from the Attorney-General, are not entitled to a mandatory injunction. It has been held in many cases and is now well established that delay, though it may not amount to proof of acquiescence, may be sufficient to disentitle a party to an injunction either interlocutory or perpetual; and this principle is for obvious reasons applied more strictly in the case of a mandatory than in the case of a merely restrictive injunction. The law on the point is well summarised in *Kerr on Injunctions*, 6th Edit. 43, where it is written: "A man who comes to the Court for a mandatory "injunction should use due diligence in making the "application. Mere delay will not be fatal to the "application if no mischief is caused thereby to the "defendant, and the delay does not exceed a reasonable "period; but the right to a mandatory injunction is "gone if there has been unreasonable delay and "mischief would be caused thereby to the defendant." Applying this test to the facts of the present case, to which I have referred in the earlier part of this judgment, I have no hesitation, both on principle and in the exercise of my discretion, in holding that it would be grossly inequitable to grant this purely equitable relief to the County Council. *Vigilantibus, non dormientibus, jura subveniunt.*

There remains to be considered the position of the Attorney-General.

The law as to whether the laches of a relator can be attributed to the Attorney-General or whether he can himself be guilty of laches when suing with a relator on behalf of the public, is not in a very satisfactory condition. In *The Attorney-General v. Johnson* (1),

(1) 2 Wils. Ch. 87, 102.

Lord Eldon, L.C., said: "If the King's subjects have "permitted the erection of a building which they were "aware would, when completed, be a nuisance, without "promptly applying to the Court to prevent it, the "Court would not consider them entitled to the "extraordinary assistance of a Court of Equity but "leave them to their legal remedy."

Robertson, in his treatise on Civil Proceedings by and against the Crown, at p. 579, takes the view that Lord Eldon, when so expressing himself, does not appear to have been directing his mind to the Attorney-General but merely to have been discussing the general principle on which laches would disentitle a subject to the assistance of a Court of Equity. Whether this be the true view or not, subsequent authority seems to make it clear that the laches of the Attorney-General at least cannot be ignored. Thus in *The Attorney-General v. Sheffield Gas Consumers' Company* (1) Turner, L.J., said that in so far as that was a proceeding by the Attorney-General he could not concur in the argument urged on behalf of the plaintiff that there is no ground for imputing delay or that delay could have no influence on such a question; that delay would affect the Attorney-General as much as a private individual he was not prepared to say; but in his opinion it was a circumstance to be considered in determining the question whether the Court should interfere, although the application to the Court be on behalf of the Attorney-General.

Page Wood, V.C., in *Attorney-General v. Bradford Canal Co.*, (2) whilst holding on the facts that laches had not been established, also expressed the opinion that there may be cases in which laches might be imputed to the public through the medium of the Attorney-General—cases such as those involving large expenditure in buildings which are seen by the public and are allowed to go on without the slightest complaint on the part of any one.

The point was again considered by Farwell, J., in *Attorney-General v. Wimbledon Housing Estate Co.*,

(1) 3 D.M. & G., 304, 323. (2) L.R. 2 Eq. 71.

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

ANDREWS, L.J.

Ltd. (1), when in the course of his judgment he said that the Court no doubt has a discretion in the case of the Attorney-General's actions as well as other actions, and that it is not sufficient for the Attorney-General simply to come to the Court and say : " I call attention " to the fact that there has been a breach of this " statute, and it follows as a matter of course that a " mandatory injunction which I ask for must be " granted."

Jelf, J., favoured the contrary opinion when in *The Attorney-General v. Scott*, (2) he said : " I incline to think, " however, that the maxim *nullum tempus occurritt regi* " prevents laches by itself being successfully set up " against the Attorney-General."

In *Attorney-General v. Metcalf & Greig*, (3) Kekewich, J., submitted " that 'laches' is not the proper term to " apply, but that there is certainly room for argument " that, though 'laches' is not applicable, the Attorney-" General may be precluded from suing by reason of " delay under such circumstances as to raise an equity " in the defendant as against any person attempting to " interfere with him."

In *Attorney-General v. South Staffordshire Waterworks Co.* (4) where the relators, the Rural District Council, had stood by and allowed the fitting up of certain unauthorised pumping stations, Warrington, J., held that in cases of *ultra vires* delay is not a ground for refusing relief in a suit by the Attorney-General.

Finally, the matter was considered by Joyce, J., in *Attorney-General v. The Grand Junction Canal Co.* (5). In that case the plaintiffs, who were the Attorney-General at the relation of an Urban District Council and, as separate plaintiffs, the Council, sued for an injunction to restrain the defendants from diverting from a river more water than they were entitled to under an Act of 1810, and for an injunction to restrain them from permitting the works to remain so constructed as not to comply with the Act. Joyce, J., held that, as the defendant had only allowed the

(1) [1904] 2 Ch. 34.
(2) [1905] 2 K.B. 160, 169.
(3) [1907] 2 Ch. 23.
(4) 25 T.L.R. 408.
(5) [1909] 2 Ch. 505, 517, 518.

works executed more than sixty years before to operate as they had done from the first and had acquired by lapse of time an absolute right to the use of the water diverted by those works, the action of the plaintiff Council, as distinct from the claim of the Attorney-General, failed; and he further held with respect to the action by the Attorney-General that the Court had a discretion as to granting a mandatory injunction in such a case: but that, having regard to the length of time which had elapsed without objection or complaint, no such injunction ought to be granted in that case. "I am of opinion," he said, "and I "decide that in such a case as the present, whether "the Attorney-General be barred by laches or not, "at all events with respect to relief by injunction, "especially by mandatory injunction, the Court has "at least a discretion and ought to have regard to the "very long period of time which has elapsed without "objection being taken or complaint made to the "costly works that were originally constructed and "have since been maintained at considerable expense."

These cases in my opinion establish that the laches of a relator is not necessarily to be attributed to the Attorney-General; and that, whilst delay on his part with knowledge of the alleged violation of his rights cannot be ignored, and is a circumstance which must always be considered, especially where the relief sought is by mandatory injunction, the Courts are somewhat slower to deny the Attorney-General, as the custodian of the public rights, relief on this ground than in the case of an individual.

I am of opinion that I have no sufficient evidence of the Attorney-General's knowledge of the proposed infringement of the rights of the public to justify me in refusing him the mandatory injunction sought in the present case. It is not suggested that he was cognisant of the correspondence which was passing between the County Council and the defendants. Neither was he affected with notice by the Inquiry or the Order of the Ministry, as neither was in terms directed to the determination of any particular site. The same observation applies to the advertisement

Ch.D. 1932.

ATTORNEY-GENERAL AND COUNTY COUNCIL OF DOWN v. NEWRY No. 1 R.D.C.

ANDREWS, L.J.

for tenders. I am not satisfied, therefore, as to the existence of actual or imputed knowledge on the part of the Attorney-General until the work was actually commenced by the contractor. His position is therefore entirely different from that of the County Council and he must be held entitled to the relief which he seeks.

A declaration will be made and an injunction granted in the terms of the prayer of the statement of claim, save that the injunction will not issue forthwith, but will have a stay placed upon it until 1st May next to give the parties the necessary time to come, if possible, to an amicable settlement of their differences which would avoid substantial loss of public moneys; or, failing such arrangement, to enable the defendants to make such application, if any, to the Ministry as they may be advised under Section 47 of the Public Health Act, 1907. It must be clearly understood, however, that I express no opinion, nor would it be right for me to do so, upon the arguments addressed to me as to the powers of the Ministry under this section, which was not pleaded and could not be relied upon as a defence in this action.

I have carefully considered the question of costs, and have come to the conclusion that the justice of the case is met by ordering the defendants to pay to the plaintiffs one half of their costs when taxed and ascertained.

Solicitor for the plaintiffs: *R. J. Dickson.*
Solicitor for the defendants: *P. Donnelly.*

J. McC.

REX v. "J." (1).

Belfast City Commission. 1931.

Nov. 25.

Criminal Law—Revenue—False income tax returns—Indictment—Common law.

An indictment against a defendant for defrauding the Revenue alleged that he, on 1st September, 1923, unlawfully, with intent to defraud and to the prejudice of our lord the King and the Commissioners of Inland Revenue, in a return of his total income from all sources for the year ending 5th April, 1923, made and delivered to the Special Commissioners of Income Tax for the purpose of assessment to super tax did falsely state that his total income from all sources, less charges, amounted to the sum of £3,927 16*s.* 6*d.*, whereas in truth and in fact his total income from all sources, less charges, for that year largely exceeded that sum as he well knew at the time when he did so falsely pretend.

There were similar counts for subsequent years.

It was contended on behalf of the defendant that no such offence as was alleged in the indictment lay at common law against a taxpayer.

Held, the indictment was good.

MOTION to quash Indictment.

An indictment was preferred against the defendant "J." of which the first count alleged that on 1st September, 1923, he did unlawfully with intent to defraud and to the prejudice of our lord the King and the Commissioners of Inland Revenue in a return of his total income from all sources for the year ending 5th April, 1923, made and delivered to the Special Commissioners of Income Tax for the purposes of assessment to Super Tax, falsely state that his total income from all sources, less charges, amounted to the sum of £3,927 16*s.* 6*d.*, whereas in truth and in fact his total income from all sources less charges for that year largely exceeded that sum of £3,927 16*s.* 6*d.*, as he well knew at the time when he did so falsely pretend.

The indictment contained five other counts, each of these counts alleging that the defendant had com-

(1) Before Andrews, L.J., presiding at the Belfast City Commission.

Belfast City Commission. 1931.

REX v. "J."

mitted a similar offence in each of the five subsequent years.

At the trial before Andrews, L.J., sitting as Judge of the Belfast City Commission, and a jury, it was contended on behalf of the defendant that the facts alleged in the indictment did not constitute an offence cognisable at common law.

Lowry, K.C. (with him *Fox*) for the defendant :—

The indictment discloses no offence in point of law. Such a prosecution is wholly unprecedented in Ireland, and even in England it had never occurred to the advisers of the Board of Inland Revenue to bring such a prosecution. The charge in the indictment did not constitute a public matter affecting the Crown, and was therefore not cognisable at the common law.

In early days, taxation was mainly assessed by the Sheriff sitting with a jury, and it was only in 1793 that the first income tax was imposed. The revenue was protected by the imposition of penalties. It had always been a common law offence in the case of a public official, to defraud the revenue, but the defendant was a private individual. It has been impossible to discover a case showing that an indictment lies at common law against a taxpayer, either, for omitting to pay as much as he ought, or for being guilty of some fraud or malpractice in connection with his tax payments. It is not a misdemeanour to defraud the King of his revenue except when it is done by one of the King's officials. The present indictment is brought because the Perjury Act, 1911, section 11 does not apply to Northern Ireland. The offence is created by certain statutes, and those statutes which created the offence also provided the remedy, and such remedy was the only remedy which it was competent for the Crown to take.

McGonigal, K.C. (with him *Dougherty*) for the Crown :—

The remedy in the statute is cumulative and does not alter the common law. Where there is already a

misdemeanour at common law existing before the statute, the statute does not affect the common law remedy.

In *R. v. Treeve* (1), it was held that all frauds which affect the Crown and the public at large are indictable.

In *R. v. Bembridge* (2), where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government, it was objected that it was only a private matter of account and not indictable; the Court held otherwise, as it related to the public revenue.

In *Rex v. Jones* (3), an apprentice was indicted for enlisting himself as a soldier. The facts of his enlisting, taking the money, and not only declaring but swearing that he was not an apprentice were clearly proved. The prisoner was convicted. In this case the conviction was afterwards set aside, but this was on the ground that the indenture ought to have been proved by a subscribing witness. The apprentice had been indicted for fraudulently intending to obtain money from the Paymaster-General and to defraud the King, by having procured himself to be enlisted without the consent of his master.

In *Rex v. Munton* (4), a storekeeper in Antigua, who had defrauded the Government by manipulating the price of goods purchased by him for the Government, was found guilty.

In *Rex v. Higgins* (5), Lawrence, J., said in his judgment that "all offences of a public nature, that is, "all such acts or attempts as tend to the prejudice of "the community, are indictable."

Rex v. Bradbury (6) was decided in the Court of Criminal Appeal, on the point whether the appellants were indictable under the Perjury Act, 1911. They had been charged and convicted of making false statements in their returns contrary to s. 5 of the Perjury Act, 1911.

(1) 2 East, P.C. 821, 822.
(2) 22 St. Tr. 1.
(3) 1 Leach, 174.
(4) 1 Esp. 62.
(5) 2 East 5, 21.
(6) [1921] 1 K.B. 562.

Belfast City Commission. 1931.

REX v. "J."

The Court of Criminal Appeal held that the appellants were indictable under section 5 of the Perjury Act, 1911.

As to the charges against the appellants of the offence at common law of defrauding the revenue with which they had also been charged, Earl Reading, C.J., who delivered the judgment of the Court, said that part of the case had not been argued, and the Court would say nothing about it. If the appellants, he said, were rightly convicted on a count for conspiracy, and also on the perjury counts, it would be idle to discuss other points which would be merely academic. On the trial at Hampshire Assizes, in 1920, however, Bray, J., decided that where a common law offence existed before the offence created by the statute, the remedy given by the statute is cumulative (1).

In *Rex v. Brailsford* (2), an indictment against two defendants for conspiracy alleged that the defendants unlawfully conspired to obtain a passport in the name of one of the defendants from the Foreign Secretary by falsely pretending and representing that that defendant desired to use the passport himself while travelling in Russia with intent that the passport should be used by another person in the name of that defendant, and that the defendants in pursuance of the conspiracy sent the passport to the other person for use by him in Russia, in fraud of the Foreign Office regulations for the issue of passports, to the injury and prejudice and disturbance of the lawful, free and customary intercourse between the subjects of the King and those of the Czar of Russia, to the public mischief of the subjects of the King, and to the endangerment of the continuance of the peaceful relations between the King and the Czar and their subjects respectively.

It was held that the indictment was good.

In *Rex v. Whitaker* (3), where a colonel of a regiment accepted from a firm of caterers sums of money paid to induce him to accept their representative as tenant

(1) This decision of Bray, J., is unreported, but a shorthand note of the judgment was produced in Court.

(2) [1905] 2 K.B. 730.

(3) [1914] 3 K.B. 1283.

of the regimental canteen, it was held that he was guilty of the misdemeanours at common law of (*a*) bribery, and (*b*) conspiracy to bribe.

In *Rex v. Carlile* (1), it was held that the statute 9 & 10 W. III, c. 32, has not altered the common law, as to the offence of blasphemy, but only given a cumulative punishment. It is therefore still an offence at the common law to publish a blasphemous libel. In that case Abbot, C.J., said: "Now I take it to be "a general rule, that where there is a misdemeanour at "common law, a statute providing a particular "punishment for it does not repeal the common law." Later on in his judgment, he said: "I believe many "instances will be found in which prosecutions at the "common law are constantly carried on against certain "offences, although there are statutes enacting par- "ticular punishments for those offences, and providing "that a particular course of proceeding shall be "adopted, in order to bring them within their "operation."

It is a broad principle that anything prejudicial to the community is indictable at common law. There could not be an act more prejudicial than an attempt to avoid payment of income tax.

We submit that the indictment is good.

ANDREWS, L.J.

ANDREWS, L.J.: Owing to the limitations of our legal library in Belfast I have not had an opportunity of reading the full reports of certain of the cases which counsel have cited. At the same time the point does not take me by surprise, as I had anticipated and considered it before the motion was made, and I have had a further opportunity of considering it during the course of the able arguments which have been addressed to me. I have therefore some confidence in the opinion which I am about to express.

The principle relied upon by the Crown was most succinctly expressed by Lawrence J., in *Rex v. Higgins* (2), when he said that "all offences of a public nature, "that is, all such acts, or attempts as tend to the "prejudice of the community, are indictable."

(1) 3 B. & Ald., 161, 163. (2) 2 East, 5, 21.

Belfast City Commission. 1931.

REX v. "J."

ANDREWS, L.J.

In my opinion, it is a common law offence to defraud the King of his revenue. It has always been a misdemeanour to make a false statement for the purpose of depriving the King of any part of his revenue; and making deliberately a false return for the purpose of defrauding the revenue is, merely, what I may call a modern illustration of that principle. It is an offence under the common law, quite apart from any created by Act of Parliament.

The next point to be determined is whether this right has been taken away by statute in so far as it relates to the making of false returns for revenue purposes. It has been argued that statute cannot take away the right of the King at common law. In my opinion, not only has the right not been taken away, but it has been expressly preserved. I say this for two reasons. In the first place this is not a new offence created by statute; and, therefore, when we find that a remedy is provided in the Finance Acts, the King is not thereby deprived of his remedy at common law.

The second reason for my opinion is founded on the express words in section 224 of the Income Tax Act, 1918, which provides that the provisions of that Act "shall not affect any criminal proceedings for any "felony or misdemeanour." Therefore, no enactment which provides for the imposition of treble charge or for power to have the matter considered at petty sessions, in any way interferes with the common law rights of the King.

This opinion which I have expressed is in accordance with the decision of Bray, J., in *Rex v. Bradbury & Edlin* (1), which was heard at the Hants Summer Assizes in July, 1920. The case is, I believe, unreported, but I have had an opportunity of perusing a transcript of the shorthand notes of the arguments and judgment. No doubt the indictment in that case included counts under the Perjury Act, 1911, which does not apply to this country, but it also included counts at common law. The learned Judge held that the counts under the Perjury Act were well laid and that they must stand. Quite independently, however, he came

(1) Unreported.

to the conclusion that the common law counts, which included one for making a false statement with intent to prejudice the public revenue, were equally sustainable. He said that it had been argued that it was not an offence known to the law, that it was not within the common law of England; but he added, that when he heard the argument made, it struck him that if it was not an offence, it was quite time it was made an offence. The common law of England was based on common sense, and it seemed to him to be eminently in accord with common sense that when a person commits an offence of this kind, and makes a false statement with a view to prejudicing His Majesty's revenue, it ought to be punishable. In his opinion all cases affecting the Crown and the public at large are indictable.

For these reasons I am of opinion that the motion to quash the indictment must fail, and the trial must proceed. The right of the defendant to test the matter further will of course be reserved.

Note.—The trial of the defendant accordingly proceeded after Andrews, L.J., had delivered judgment, and resulted in the disagreement of the jury.

Solicitor for the prosecution: *Chief Crown Solicitor.*
Solicitor for the defendant: *J. C. W. Rea.*

J. McC.

C.A. 1933.

IN RE DEENEY, DECEASED: DEENEY v. DOHERTY AND DEENEY (1).

Feb. 2.

Administration—Intestate's Estate—Statute of Limitations—"Present right to receive the same"—Acknowledgment—Law of Property Amendment Act, 1860 (23 & 24 *Vict.*, *c.* 38), *s.* 13.

H. D. died 10th January, 1911, intestate. S. D., his widow, thereupon entered into possession of the deceased's estate and effects and remained in possession until her death on 22nd January, 1932. On 11th May, 1922, S. D. took out a grant of administration to his estate.

S. D. appointed C. D. one of the defendants the executor of her will. The plaintiff took out a grant *de bonis non* to the estate of the said H. D. and sought the aid of the Court in administering the estate. It was argued on behalf of the plaintiff that the extraction of administration by the said S. D. constituted an acknowledgment within the meaning of s. 13 of 23 & 24 Vict., c. 38, or alternatively that the period of limitation under s. 13 did not commence to run until a grant of administration had been taken out.

Held, by the Court of Appeal (affirming the decision of Megaw, J.):—

(1) That under s. 13 of 23 & 24 Vict., c. 38, the period of limitation runs from the date of the death of the intestate.

(2) That the taking out of a grant of administration does not constitute an acknowledgment under s. 13 or otherwise prevent the Statute running in favour of the administrator.

CASE STATED by Megaw, J., in the Chancery Division for the opinion of His Majesty's Court of Appeal on the hearing of an appeal from the Recorder of Londonderry under 52 & 53 Vict., c. 48.

This case came before me on appeal by the defendants from the decree of the Recorder of Londonderry made on 14th day of June, 1932, in the Matter of the Estate of Henry Deeney, deceased. Mr. McCoy (instructed by T. G. Logue, Londonderry) appeared for plaintiff, Mr. Black, K.C., and Mr. Nicholson (instructed by D. MacLaughlin & Sons) appeared for defendants. The said decree was for the administration of the personal estate and real estate devolving as personalty under the provisions of the Local Registration of Title (Ireland) Act, 1891.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

I refer to the equity civil bill, the defence, the said decree and the notice of appeal which are attached hereto and are incorporated herewith. The facts proved by the plaintiff at the trial are set out in the notes of the learned Recorder, dated the 7th July, 1932. These facts were as follows:—

The plaintiff is the administrator *de bonis non* of the said deceased, under a grant dated the 6th May, 1932. Henry Deeney died on the 10th January, 1911, intestate and on the 11th May, 1922, a grant of administration to his estate and effects was granted to his widow, Sarah Deeney. The said Sarah Deeney entered into possession of the estate and effects of the said Henry Deeney, deceased, on his death, but did not fully administer the same, and by her will, dated the 10th July, 1920, she *inter alia* purported to dispose of the estate and effects of the said Henry Deeney, deceased, in her hands, and appointed the defendant, Conn Doherty, executor of her will. The said Sarah Deeney died on the 22nd of January, 1932, and on the 23rd March, 1932, a grant of probate of the said will was made to the said defendant, Conn Doherty. The defendant, Henry Deeney, is a son and one of the next-of-kin of the said Henry Deeney, deceased. The plaintiff as administrator *de bonis non* of the said Henry Deeney, deceased, now seeks the assistance of the Court in administering the estate of the said deceased.

The defendants contended that on the above facts the next-of-kin of the said Henry Deeney, deceased, were *prima facie* statute barred by section 13 of the Law of Property Amendment Act, 1860, from asserting against the said Sarah Deeney or against the defendants as claiming under the said Sarah Deeney any claim to any share of the estate or assets of the said Henry Deeney, deceased, and that the suit should accordingly be dismissed. The defendants contended that the period of twenty years mentioned in the said section 13 ran from the 10th January, 1911, the date of the death of the said Henry Deeney, or alternatively, from the expiration of one year from the said 10th January, 1911, and that the grant of administration, extracted

C.A. 1933.

DEENEY, DECEASED; DEENEY v. DOHERTY AND DEENEY.

on the 11th May, 1922, by the said Sarah Deeney, widow of the said Henry Deeney, did not constitute an acknowledgment within the meaning of the said section 13. The plaintiff contended that the grant of administration extracted on the 11th May, 1922, by the said Sarah Deeney who was in possession of the assets of the said Henry Deeney, deceased, constituted an acknowledgment within the meaning of section 13 and that therefrom the character of her possession was changed and that she was in possession of the said assets as administratrix for herself and all the next-of-kin and that the period of twenty years mentioned in the section was to be computed as from the 11th May, 1922, the date of the said grant. I held that the extraction by the said Sarah Deeney of the said grant of administration did not constitute an acknowledgment within the meaning of the said section 13 and I accordingly reversed the decree of the Recorder and dismissed the said suit with costs of appeal and in the Court below. On the application of plaintiff's Counsel I gave the plaintiff leave to appeal to the Court of Appeal under section 8 of the County Court Appeals (Ireland) Act, 1889, on the question of law whether the grant of administration extracted on 11th May, 1922, constituted an acknowledgment within the meaning of section 13 of the Law of Property Amendment Act, 1860, and whether the character of the possession of the said Sarah Deeney was then changed to possession on behalf of herself and all the next-of-kin.

The question for the Court of Appeal is :—

> Whether the grant of administration extracted by the said Sarah Deeney on the 11th May, 1922, constituted an acknowledgment by her within the meaning of section 13 of the Law of Property Amendment Act, 1860, or otherwise prevented the Statutes of Limitations having run in her favour at the date of the equity civil bill herein.

McCoy for the appellant :—

The period of limitation did not begin to run under section 13 of the Law of Property Amendment Act, 1860, until the date of the extraction of administration.

Section 13 did not commence to run until some person had extracted a grant of administration, because until there was an administrator the next-of-kin could not receive their shares. Section 13 on its true construction contemplates not only a hand to give but a hand to receive the distributive shares of the estate. Distributive shares only become such when an administrator has administered the estate by calling in all the outstanding estate and discharging all liabilities for death duties and debts of the deceased. Prior to such administration the next-of-kin have merely indeterminate rights in the estate and it cannot be said what the precise rights of the next-of-kin are until the administrator has performed his duties. The absence of a personal representative until an administrator is appointed distinguishes the cases of intestacy from the cases where there is an executor appointed by a will. This principle distinguishes the cases decided under section 8 of the Real Property Limitation Act, 1874. Where the widow remains in possession of chattels real for a number of years without taking out a grant of administration and subsequently extracts a grant within twelve years from the date of the death and therefore before a title has been acquired to such chattels real by the next-of-kin in possession under section 1 of the Real Property Limitation Act, 1874, the character of her possession changes once she is clothed with the capacity of administratrix. Her previous possession along with the next-of-kin before she takes out administration is merely attributable to her indeterminate right as widow to such share to which she may subsequently be ascertained to be entitled. But the moment she takes out the grant the character of her possession changes and it is then attributable to her capacity as administratrix and as such her possession is not possession of part or an indeterminate interest in the farm but of the whole farm.

[He referred to *In re Maguire and McClelland's Contract* (1).]

The extraction of a grant of administration after acquisition by one or more of the next-of-kin of an

(1) [1907] 1 I.R. 393.

C.A. 1933.

DEENEY, DECEASED; DEENEY v. DOHERTY AND DEENEY.

absolute title under section 1 of the Real Property Limitation Act, 1874, could have no greater effect than an acknowledgment in writing. The right was extinguished, not merely the remedy. [*In re McClure and Garrett's Contract* (1).] But when a grant is extracted within twelve years by a next-of-kin in possession the administrator has possession from the date of the grant not only for himself and those in possession but for all the next-of-kin entitled at the date of the grant. [He referred to the judgment of Palles, C.B., in *McArdle v. McArdle* (2).]

The present right to receive only comes into existence when a grant of administration has been taken out and there is no right to receive until the assets have come into the hands of the administratrix as such. In this case the administratrix never came into possession of the deceased's farm as administratrix until she extracted the grant. "The right to receive "means right to receive from the executor or ad- "ministrator or the representatives, and not from the "debtor to the estate, from whom the legatee or "next-of-kin has no right to receive." [*Per* Chitty, J., in *In re Johnson, Sly v. Blake* (3).] "It seems to me "that 'a present right to receive the same' means a "right to recover by legal proceedings." [*Per* Kekewich, J., in *In re Pardoe, McLaughlin v. Penny* (4).]

Black, K.C., and *Nicholson*, for the respondent:—

Under section 13 of the Law of Property Amendment Act, 1860, the period of limitation commences to run against a claimant to a share of the personal estate of an intestate immediately upon a present right to receive such share having accrued to him. In the case of a next-of-kin who is *sui juris* so as to be capable of giving a discharge his present right to receive accrues at the death of the intestate.

The Irish Court of Appeal have held in *Waddell v. Harshaw* (5), that under the analogous section 8 of the

(1) 33 I.L.T.R. 49.
(2) 33 I.L.T.R. 110.
(3) 29 C.D. 964, 970.
(4) [1906] 1 Ch. 265, 269.
(5) [1905] 1 I.R. 416.

Real Property Limitations Act, 1874, the present right of a legatee to receive his legacy accrues at the date of the death of his testator and that the twelve years period of limitation under that section runs from that date. Section 13 of the Law of Property Amendment Act, 1860, and section 8 of the Real Property Limitation Act, 1874, which replaced section 40 of the Real Property Limitation Act, 1833, are in *pari materiâ* and ought to be construed together. [*Per* Chitty, J., in *In re Johnson, Sly v. Blake* (1).]

An action by a residuary legatee for the administration of his testator's estate is within section 8 of the Real Property Limitation Act, 1874 (*In re Richardson* (2)]. And the right of a next-of-kin under the Statute of Distributions is the same as that of a residuary legatee under a will, the statute being in the nature of a will for persons who die intestate (*Cooper v. Cooper* (3)).

The words "present right to receive" are not the same as "present right to enforce payment." The dictum to the contrary of Lord Romilly in *Earle v. Bellingham* (4) has been disapproved by the English Court of Appeal in *Hornsey Local Board v. Monarch Investment Building Society* (5) and by the Irish Court of Appeal in *Waddell v. Harshaw* (6). The decision of Kekewich, J., in *In re Pardoe, McLaughlin v. Penny* (7), which was reversed on another point by the Court of Appeal (8) cannot be relied upon. It is disapproved in the text books and is inconsistent with *Waddell v. Harshaw* (6).

In order that an acknowledgment may have effect under section 13 of the Law of Property Amendment Act, 1860, it must be in writing and be given to the person entitled or his agent. The affidavit made by Sarah Deeney when taking out administration is not such an acknowledgment. [*Re Beaven* (9); *Lloyd v. Coote and Ball* (10).]

(1) 29 C.D. 964, 970.
(2) [1920] 1 Ch. 423.
(3) L.R. 7 H.L. 53.
(4) 24 Beav. 448.
(5) 24 Q.B.D. 1.
(6) [1905] 1 I.R. 416.
(7) [1906] 1 Ch. 265.
(8) [1906] 2 Ch. 340.
(9) [1912] 1 Ch. 196.
(10) [1915] 1 K.B. 242.

C.A. 1933.

DEENEY, DECEASED: DEENEY v. DOHERTY AND DEENEY.

ANDREWS, L.J.

ANDREWS, L.J.: [Having stated the facts proceeded]:—

The whole question to be decided in this case is whether the plaintiff has any right to or interest in the property comprised in his father's estate, or whether it became by lapse of time and by the widow's uninterrupted possession for upwards of twenty-one years her own absolute property.

The answer to this question depends in my opinion upon the true construction of section 13 of the Law of Property Amendment Act, 1860, and, in particular, the meaning of the words "present right to receive." The section opens with the words:—"No suit or other "proceeding shall be brought to recover the personal "estate or any share of the personal estate of any "person dying intestate possessed by the legal "personal representative of such intestate, but within "twenty years next after a present right to receive the "same shall have accrued to some person capable of "giving a discharge for or release of the same, "unless . . ."

Does the period of twenty years run from the date of death or from the date upon which she clothed herself with the representative capacity? Had the plaintiff as one of his next-of-kin a right to receive a share of the deceased's estate within the section from the date of the death of the deceased, though there was no person in existence until more than eleven years later who could have accepted a discharge or release for the same?

It has been argued on behalf of the plaintiff that the question must be answered in the negative, and that time can only run within the section where there is not only a person who has a present right to receive and is capable of giving a discharge or release, but also a person who is capable of accepting such discharge or release. At first sight the words of Chitty, J., in *In re Johnson, Sly v. Blake* (1), to which we were referred by plaintiff's Counsel might be thought so to imply. I am satisfied, however, that no such

(1) 29 C.D. 964, 971.

conclusion was intended and that his reference to the executor or administrator as the person from whom the right to receive exists is descriptive of property in possession as contrasted with property, such as a reversionary interest or a policy which had not become a claim, in which case a next-of-kin could have no right to receive from a debtor to the estate.

In *In re Pardoe, McLaughlin v. Penny* (1), a passage of Kekewich, J., has been referred to which, if correct, would carry the plaintiff a long way. "It seems to "me," he says, "that 'a present right to receive the "'same' means a right to recover by legal pro-"ceedings."

The right to recover by action necessarily involves the existence of a person to be sued, namely, an administrator. We cannot, however, accept this statement of the law. It has been questioned in more than one of our leading text-books. See *Lightwood's Time Limit of Actions*, at page 170, where it is stated to be inconsistent with *Hornsey Local Board v. Monarch Building Society* (2), and *Halsbury's Encyclopædia of the Laws of England*, Vol. xix, at page 87. In our opinion such a construction reads something into the section which it does not contain and which is not authorised by it. It gains no weight from the Court of Appeal, where the decision was reversed on another point (3) and it consequently became unnecessary to consider the view of Kekewich, J., to which I have referred.

In my opinion a right to receive may be, and in the present case is, something quite different from a right to recover by action. The period of twenty years referred to in section 13 runs in the present case from the date of the death of the intestate Henry Deeney. Sarah Deeney, his widow, had, accordingly, acquired an absolute interest in the property before her death; and the plaintiff has no right to maintain this action either in his personal or representative capacity. The decision of Mr. Justice Megaw was right.

(1) [1906] 1 Ch. 265.
(2) 24 Q.B.D. 1.
(3) [1906] 2 Ch. 340.

C.A. 1933.

DEENEY, DECEASED; DEENEY v. DOHERTY AND DEENEY.

BEST, L.J.

BEST L.J.: I agree. All I wish to add is that I think there were no special circumstances such as in the case of *In re Johnson* (1).

Solicitor for the appellant: *T. G. Logue.*

Solicitor for the respondents: *D. MacLaughlin & Sons.*

J. R.

(1) 29 C.D. 964.

IN THE MATTER OF THE ESTATE OF JOSEPH FINLAY, DECEASED, Ch.D. 1932.

DINSMORE v. FINLAY (1). Nov. 3, 8.

Will—Legacies subject to a Condition to assume testator's name within a fixed time—Failure to appreciate and perform Condition—Condition precedent or condition subsequent—Absence of gift over.

A testator after certain devises and bequests added a proviso to his will that no person should be entitled to any share in his residuary estate unless he or she within three months after the death of testator's wife or after he or she should attain the age of twenty-one, whichever should last happen, should assume the testator's surname unless prevented from doing so by death.

Testator's widow died in 1929, N. T., who had died before the execution of the will, left one child surviving her, R. A. L., who predeceased the testator's widow leaving two children, I. B. (wife of J. B.) and H. L. I. B. died more than three months after the death of the widow, without having assumed the testator's surname, and H. L. was still alive at the date of the hearing, but had not adopted the testator's surname within three months of the death of the widow.

Held, that the condition was a condition subsequent and that the residue on the death of the testator's widow was vested in the persons designated in the residuary clause, though subject to being divested if the condition was not complied with.

Held, also, that as there was no gift over in case of non-compliance, the proviso should be treated as directory not mandatory, that the time for adopting the name was not of the essence of the gift and that the condition would be sufficiently complied with by the legatees adopting the name before getting their legacies paid.

The testator, Joseph Finlay, died on 3rd December, 1893, having by his will, dated March 2nd, 1893, appointed his wife, Mary Jane Finlay, and Alexander Lawther (Junior) as executors and trustees.

He devised the residue of his real and chattel real estate to his trustees in trust to permit his wife to receive the rents and profits for her life and after her death to sell the same and hold the proceeds of sale in trust for all the children of his brothers, William

(1) In the Chancery Division before Megaw, J.

Ch.D. 1932.

IN RE JOSEPH FINLAY, DECEASED; DINSMORE v. FINLAY.

Finlay, James Finlay and Robert Finlay, and his sisters, Nancy Thompson and Sarah Lough, living at the death of the survivor of the testator and his wife, and for the children or child then living of any then deceased child of the testator's brothers and sisters, whether such deceased child should have died prior or subsequent to the date of the will, and who being male should attain the age of twenty-one years or being female attain that age or marry, if more than one in equal shares but so that the children of any deceased child of the testator's brothers or sisters should take equally between them only the share which their parent would have taken had he or she survived the testator and his wife and attained a vested interest.

The will also contained a provision that no person should be entitled to any share in the testator's residuary estate unless he or she within three months after the death of the testator's wife or after he or she should attain the age of twenty-one years, whichever should last happen, should assume the name of Finlay, unless in either of such cases such person should be prevented from doing so by death.

The testator's widow died in 1929. One of the five brothers and sisters of the deceased was Nancy Thompson, who died before the execution of the will, and left one child, her surviving, Rose Anne Laird. Rose Anne Laird died in the lifetime of the testator's widow leaving two children, Isabella Brown (wife of James Brown) and Hugh Laird. Isabella Brown died on the 26th May, 1929, more than three months after the death of the testator's widow, without having assumed the name of Finlay, and Hugh Laird was still alive, but had not adopted the name of Finlay within three months of the death of the testator's widow. Hugh Laird, in his evidence, expressed his readiness to assume the name of Finlay at any time.

The matter came before the Court by way of a request from the Assistant Chief Clerk for the opinion of the Judge of the Chancery Division on the following point which had arisen on the enquiries at Chambers :—

(*a*) Whether or not it is a condition precedent to any person taking a share in the testator's

residuary estate that the beneficiary should have complied with the following condition which is set out in the will, namely, "Provided "always that no person shall be entitled to any "share in my residuary estate unless he or she "within three months after the death of my "wife or after he or she shall attain the age of "twenty-one years, whichever shall last happen, "shall assume the name of Finlay, unless in "either of such cases such person shall be "prevented from so doing by death?"

(*b*) If the condition referred to in query (*a*) is not a condition precedent what effect on the distribution of the estate has this condition on a person who has (*a*) changed his name but not within the period of three months, (*b*) a person who has neglected to change his name as provided by the will.

Ellison for the trustees of the will:—

The question to be decided is, whether or not the condition in the will is a condition precedent or a condition subsequent. Referring to conditions precedent, Chatterton, V.C., said in *Bevan v. Mahon-Hagan* (1), "nothing short of physical impossibility, "or impossibility caused by the act of the testator, "or the performance involving a breach of morality, "will suffice to avoid the condition and make the gift "absolute."

If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the Court will prefer the latter construction. *In re Greenwood, Goodhart v. Woodhead* (2). In *O'Higgins v. Walsh* (3), a testatrix directed that M. should within one year from testatrix's death execute a settlement of certain interests to which she should become entitled under the will upon certain specified trusts, and directed that in the event of M. neglecting or declining to carry out that direction, the

(1) 27 L.R.I. 399, 411.
(2) [1903] 1 Ch. 749.
(3) [1918] 1 I.R. 126.

Ch.D. 1932.

IN RE JOSEPH FINLAY, DECEASED; DINSMORE v. FINLAY.

trusts concerning her life estate in the sum of £1,000 and all ulterior trusts thereof should be deemed of no effect; and there was then a gift over in favour of another daughter and her issue. The testatrix also directed that her solicitor (trustee and executor of her will) should act in carrying out the trusts of the will, and in the preparation and execution of any deeds to be executed for the carrying out of the desire and intention of the testator. The will was read over and explained by the solicitor trustee to the legatee, but the Court came to the conclusion that she did not clearly understand its provisions. She expressed herself willing to sign any document that the solicitor trustee should supply to her. She never executed any settlement in pursuance of the direction in the will. More than one year had elapsed since the death of the testatrix.

It was held that the solicitor trustee was not under any obligation to prepare or submit any particular document to the legatee for execution, and that as she had not complied with the conditions she forfeited the legacy, and the gift over took effect.

In *In re Packard, Packard v. Waters* (1), it was held, that assuming the condition was a condition precedent, the limit of time was not of the essence or substance of the condition, which would be sufficiently complied with by the daughter's execution of a proper settlement within the year.

MacDermott, for Hugh Laird, a son of Rose Anne Laird, and also for James Brown, the husband of Isabella Brown, deceased.

The beneficiaries whom I represent were not aware of the condition, until after the period of three months had expired. As to Hugh Laird, the period of three months is only directory not mandatory. It is very important that there is no gift over in case of non-compliance.

In *Jarman on Wills*, vol. II. (seventh edition), p. 1454, the law is stated as follows:—"As a general rule,

(1) [1920] 1 Ch. 596.

"ignorance of a condition annexed to a devise or "bequest does not protect the devisee or legatee from "the consequences of non-performance, at all events "where there is a gift over." In all the cases which have been already cited there is a gift over, those cases are therefore distinguishable. A Court of Equity is willing to relieve from forfeiture where the rights of others are not prejudicially affected. The Court will look on the limitation of time as merely directory.

In *Taylor v. Popham* (1), the Lord Chancellor, Lord Thurlow, said: "If the Court can put the parties in "the same situation as if the condition had been "performed, it will never suffer a forfeiture to attach."

In the present case, the parties are in the same position as if they had assumed the name within three months.

I rely on *In re Packard, Packard v. Waters* (2), where it was held that a condition that a settlement was to be executed within a year, was merely directory. In that case Sargant, J., after stating that the principle to be applied is that which is laid down in *Roper on Legacies*, 4th ed., p. 767, in the cases which are there referred to, said, "in those cases it was held that "where there was no gift over, so that there was no "question of divesting an interest vested in such "ultimate donee the mere time of payment or release "was not of the essence of the condition, and accord-"ingly that a subsequent release or a subsequent "payment by the legatee might amount to a sub-"stantial compliance with the condition."

I also rely on *In re Evan's Contract* (3).

Another case on which I rely is *In re Goodwin, Ainslie v. Goodwin* (4), where *In re Packard, Packard v. Waters* (2) was adopted. In *In re Goodwin, Ainslie v. Goodwin* (4), Romer, J., said, in his judgment, "It is "well settled by authority that where a gift in a will "is made subject to a condition, even a condition "precedent, to be performed within a specified time, "but the condition is not in fact performed within

(1) 1 Bro. C.C. 168.
(2) [1920] 1 Ch. 596.
(3) [1920] 2 Ch. 469.
(4) [1924] 2 Ch. 26.

Ch.D. 1932.

IN RE JOSEPH FINLAY, DECEASED; DINSMORE v. FINLAY.

"that time, then, at any rate in the absence of an "express gift over, it is always a question for the Court "to determine whether the time so specified was of the "essence of the matter. In determining that question "the Court must have regard to what was presumably "the intention of the testator in inserting the con- "dition, what it was that he desired to bring about or "to guard against; and if the Court finds that a "performance of the condition at a time subsequent "to the expiration of the period fixed by the testator, "in substance provides for the very thing that the "testator intended to provide for, so that all parties "can be put in substantially the same position as they "would have been in, had the condition been per- "formed within the proper time, time is not regarded "as of the essence, and such performance is treated as a "sufficient compliance with the condition."

I submit that these authorities govern the point. Isabella Brown as she is dead cannot comply with the condition. If she had lived she would have been in the same position as Hugh Laird. She could have qualified before her death by assuming the name. It is difficult to see why the interest of Isabella Brown should be lost. I submit that the principles applicable are those which were laid down by Sargant, J., and Romer, J., in the cases which have been referred to. There was no change in circumstances which would abrogate the rule. The period of three months is only directory and there is no forfeiture.

J. D. Chambers for the defendant, Alexander Reford Finlay:—

I submit that the persons who take interests in the residuary estate are those who have changed their names according to the directions in the will. The entire residue should be divided amongst those who have changed their names according to those directions.

No gift over was necessary in the present case. Ignorance of the terms of the will is no sufficient answer.

Ch.D. 1932.

IN RE JOSEPH FINLAY, DECEASED; DINSMORE v. FINLAY.

I rely on the decision in *In re Hodge's Legacy* (1). In that case Sir John Wickens, V.C., said: "What the "testator required has not been done, and the Court "cannot make a will for him, and say that under all "the circumstances, compliance with the condition "ought not to be exacted from the legatee. It is "clear, upon authority and principle, that neither "ignorance, illness, nor neglect on the part of the "executor to inform the legatee can excuse him for "not complying with the direction so as to entitle "him to the gift."

The case for the defendant is based on the will itself. If there were five legatees and three change their names according to the directions in the will, the residue ought to be divided amongst the three. The condition should be dealt with as a condition precedent and should be construed strictly. I rely also on *Horrigan v. Horrigan* (2).

Cur adv. vult.

MEGAW, J.

Nov. 8.

MEGAW, J.: This matter came before me on a request from the Assistant Chief Clerk for the determination of a question arising in the estate of Joseph Finlay, deceased.

Joseph Finlay made his will on 2nd March, 1893, and dealt with the residue as follows:—"I devise all "the residue of my real estate including chattels real "to my trustees upon trust to permit my wife to "receive the rents and profits or income thereof "during her life and after her death upon trust to sell "the same and to hold the net proceeds of such sale "in trust for all the children or child of my said late "brothers, William Finlay, James Finlay and Robert "Finlay, and my late sisters, Nancy Thompson and "Sarah Lough, living at the death of the survivor of "myself and my wife and for the children or child "then living of any then deceased child of my said "brothers and sisters and whether such deceased child "shall have died prior or subsequent to the date of "this my will who being male attain the age of twenty-"one years or being female attain that age or marry

(1) L.R. 16 Eq. 92, 96. (2) [1904] 1 I.R. 29.

Ch.D. 1932.

IN RE JOSEPH FINLAY, DECEASED; DINSMORE v. FINLAY.

MEGAW, J.

"if more than one in equal shares but so that the "children of any deceased child of my said brothers "and sisters shall take equally between them only the "share which their parent would have taken had he "or she survived myself or my wife and attained a "vested interest."

The testator died on 3rd December, 1893, and probate was granted to his executors on 19th January, 1894. Mary Jane Finlay, one of the executors, died on 20th January, 1929. She did not adopt any child. The plaintiffs are the present trustees of the will and have instituted proceedings for administration—as I understand—to have the protection of the Court in the administration of the residuary gift I have read.

The difficulty arises as regards the question whether or not the proviso in the will that no person shall be entitled to any share in the residuary estate unless he or she shall within three months after the death of the testator's wife or after he or she shall attain the age of twenty-one years whichever shall last happen shall assume the name of Finlay unless in either of such cases such person shall be prevented from doing so by death.

One of the five brothers and sisters of the deceased was Nancy Thompson, who had died before the execution of the will, and left one child her surviving, Rose Anne Laird, who, if she had survived Mrs. Mary Jane Finlay and complied with the testamentary conditions, would have been entitled to one-fifth of the residue. Rose Anne Laird died in the lifetime of Mrs. Finlay leaving two children, Isabella Brown (wife of James Brown) and Hugh Laird. Isabella Brown died on the 26th May, 1929, more than three months after Mrs. Finlay's death, without having assumed the name of Finlay, and Hugh Laird is still alive. James Brown, husband of Isabella Brown, and Hugh Laird are notice parties to the administration proceedings. I appointed James Brown for the purpose of the proceedings to represent the estate of Isabella Brown—Hugh Laird did not adopt the name of Finlay within three months of Mrs. Finlay's death.

Both James Brown and Hugh Laird were in Court and gave evidence. Having heard them, I came to the conclusion, that though both Isabella Brown and Hugh Laird had heard the will read and had opportunity of appreciating and giving effect to the clause dealing with the assumption of the name, neither of them in the least appreciated its meaning. They were in a comparatively humble position in life, and I am quite satisfied that each of them, had they had the matter brought to their knowledge, would have had no hesitation in assuming the name "Finlay." Hugh Laird in his evidence given on oath before me expressed his readiness to do so at any time, and I accept his evidence.

The question to be determined by me is whether in consideration of the fact that neither Isabella Brown nor Hugh Laird assumed the name of Finlay on or before 19th April, 1929, both or either of these legatees were thereafter precluded from having any share in the residuary estate of Joseph Finlay.

As laid before me by the memorandum of the Assistant Chief Clerk, the decision is supposed to turn on whether the gift of residue is affected by the proviso as a condition precedent or a condition subsequent. Mr. Chambers for the defendant, one who is clearly entitled to a share of residue, accepts the position that unless the condition is a condition precedent, he is precluded from contesting that Mr. MacDermott's clients, James Brown and Hugh Laird, have still rights in the residue on the authorities relied on by him. He also contends that in case it is held to be a condition precedent, and the gifts to Isabella Brown and Hugh Laird fail, there is no intestacy as regards this part of the estate, but that it is dealt with by the residuary clause.

As I read the will, I have come to the conclusion—though I cannot say that I have done so without some doubt—that the condition is a condition subsequent. It seems to me that upon the true construction of the will the residue on the death of Mrs. Mary Jane Finlay was vested in the persons designated in the clause "in "trust for all the children or child of my said late "brothers William Finlay, James Finlay and Robert

Ch.D. 1932.

IN RE JOSEPH FINLAY, DECEASED; DINSMORE v. FINLAY.

MEGAW, J.

"Finlay and my late sisters Nancy Thompson and "Sarah Lough . . ." though subject to being divested if the condition was not complied with by any of the participants. Wherever there is a doubt, the law favours vesting.

However that may be, after consideration of the cases cited by Mr. MacDermott, I am inclined to the opinion that his contention, which is not based on the question whether the condition is precedent or subsequent, is correct. He contended that, as there was no gift over, in case of non-compliance, the proviso should be treated as directory and not mandatory, relying most strongly on *In re Packard* (1), and some other cases to the same effect. Having considered the various arguments and cases cited, I have come to the opinion that the case is governed by the principles laid down in *In re Packard* (1). There was no gift over in the present case and it is worthy of notice that in a later proviso creating a forfeiture, there is in terms a gift over directing that the forfeited share shall form part of the residuary estate which was to be divided as if the person not complying with the requirement had predeceased testator.

Mr. Chambers in his argument referred to a decision, *In re Hodge's Legacy* (2), to show that knowledge of the parties was of no importance. This is really irrelevant if the view I have formed is correct that the time of choice is not of the essence of the condition, but I may point out that in view of such cases as *In re Packard* (1) and the more recent case of *In re Quintin Dick* (3), which is not without value in regard to some other aspects of this case, I do not think that *In re Hodge's Legacy* (2) can be regarded as unquestioned law.

The trend of the more recent cases seems to pay more regard to the real intention of a testator, and I do not think that the question of time was regarded by the testator as of essential importance, especially in view of the fact that there was no gift over. His intention seems to me to be that a legatee before getting his legacy *paid* should adopt the name of Finlay. It

(1) [1920] 1 Ch. 596.
(2) L.R. 16 Eq. 92.
(3) [1926] Ch. 992.

must be satisfactorily established therefore that Hugh Laird adopts the name before his legacy is paid. There is a distinction between the two cases of Laird and Brown, but on the whole as I am of opinion that the time for adopting the name was not of the essence of the gift, and that there was no refusal by Isabella Brown to comply with the condition during the short time she survived the testator and in the circumstances appearing on the evidence the vested bequest (as I regard it) to Mrs. Brown should not be disturbed but should be paid to James Brown.

It seems to me that if these legacies failed, there would be an intestacy *pro tanto*.

Solicitors for the trustees of the will: *Hugh Hayes & Son.*

Solicitors for James Brown and Hugh Laird: *John McKee & Son.*

Solicitors for the defendant, Alexander Reford Finlay: *J. Morris McKee.*

J McC

C.A.
1933.

Jan. 23.
Feb. 8.

McCARTHY v. HASTINGS (1).

(1932. No. 117.)

Criminal conversation—Proof of Marriage—Evidence of plaintiff and his wife—Sufficiency of—New Trial.

In an action for damages for criminal conversation by the defendant with the plaintiff's wife, evidence was given that the plaintiff and A. J. McC., his alleged wife had lived together as man and wife and were generally reputed as such. The plaintiff and his alleged wife gave evidence of the actual celebration of the marriage. No other evidence was given or produced on behalf of the plaintiff.

The Judge decided that strict proof of a marriage being essential, the plaintiff had not discharged the onus of proof, and he directed the jury to find a verdict for the defendant, which they accordingly did.

The plaintiff brought a new trial motion to set aside the verdict and judgment.

Held, by the Court of Appeal (Moore, L.C.J., and Best, L.J.), that the evidence given by and on behalf of the plaintiff constituted sufficient prima facie proof of the marriage, and that the case should not have been withdrawn from the jury. The appeal was allowed and a new trial ordered.

New Trial Motion.

The action which was one for damages for criminal conversation by the defendant with the plaintiff's wife, was tried by Brown, J., and a special jury of the City of Belfast, on November, 14th, 1932.

In his statement of claim the plaintiff had stated that he had been lawfully married to his wife, Ann Jane McCarthy, on 19th January, 1907. In his defence the defendant denied that the plaintiff was or had ever been the lawful husband of Ann Jane McCarthy.

The evidence of the plaintiff, so far as material for the purposes of the present report was as follows :—

Married 19th January, 1907.

"I have not my marriage certificate here. . . .

(1) In the Court of Appeal before Moore, L.C.J., and Best, L.J.

I have tried to get a marriage certificate. It is not registered. Father McAleese married me. He is still in charge of the Parish. . . .

I went to Father McKillop. He could not find any certificate in the book."

The evidence of Ann Jane McCarthy, the plaintiff's alleged wife, was as follows :—

"Wife of plaintiff. Married January, 1907. Married in our own house in Kearney by Father McGorrian and Father McAleese. Father McGorrian is dead. Miss McNeice the witness is dead."

No other evidence of marriage was given or produced on behalf of the plaintiff.

At the close of the plaintiff's case counsel for the defendant asked for a direction on the ground that there was no evidence of the marriage fit to go to the jury.

Counsel for the plaintiff submitted that there was some evidence, the testimony of the spouses.

In his report, the Judge stated that he came to the conclusion that as in this case strict proof of a real marriage was essential, the plaintiff had not discharged the onus of proof upon him. The Judge therefore directed the jury to find a verdict for the defendant, which they accordingly did, and the Judge gave judgment for the defendant.

The defendant moved for a new trial, on the ground that the learned Judge was wrong in law in directing the jury that there was not sufficient evidence of the marriage of the plaintiff with his wife, Ann Jane McCarthy.

T. J. Campbell, K.C., and *Topping* in support of the motion :—

Evidence of the marriage was given by the plaintiff and by his wife.

We submit that the evidence of the spouses was sufficient. The Evidence Further Amendment Act, 1869, makes the parties in such cases as the present competent to give evidence.

C.A. 1933.

McCarthy v. Hastings.

Rex v. William Allison, alias *Wilkinson* (1), decided that in a prosecution for bigamy, if the marriages are proved by a person present at them, it is not necessary to prove the registration, or licence, or banns. In *Wallace v. Wallace* (2), the Court accepted as evidence in proof of a marriage solemnized in 1866, in Dublin, according to the rites of the Established Church of England and Ireland, a copy of an entry in the register of marriages, purporting to be signed, and certified as a correct copy of the entry, by the clergyman of the parish where the marriage was celebrated.

In *Reed v. Passer* (3), it was held that the Fleet books were not evidence. But the general reputation of the family that the parties were married in the Fleet was good evidence. The registration of a marriage is not absolutely necessary to make it valid.

In *Morris v. Miller* (4), it was held that a marriage in fact must be proved in an action for criminal conversation, but the Court did not define what might or might not be evidence of a marriage in fact.

In *Roscoe's Criminal Evidence* (13th edition), it is stated at page 145 that "a register is only one mode "of proof of the fact which it records, and the fact may "be proved without producing the register, by the "evidence of a person who was present at it."

In *Reg. v. Henry Mainwaring* (5), the prisoner was convicted on an indictment for bigamy. It was alleged that the first marriage took place in a dissenting chapel duly licensed for marriages, and a witness was called who proved that he was present at the marriage, that it took place in the dissenting chapel in the presence of the registrar, that the entry of the marriage in the registrar's book was signed by the witness as a witness to the marriage, and that the parties afterwards lived together as man and wife for some years. It was held that the parol testimony of the witness sufficiently proved the fact of marriage.

In *Halsbury's Law of England*, vol. 16, page 310, par. 604, the law is stated as follows :—"Where there

(1) Russ & Ry. 109.
(2) 74 L.T. 253.
(3) 1 Peake 303.
(4) 4 Burr 2057.
(5) Dears. & Bell 133.

"is evidence of a ceremony of marriage having been "gone through, followed by the cohabitation of the "parties, everything necessary for the validity of the "marriage will be presumed, in the absence of decisive "evidence to the contrary, even though it may be "necessary to presume the grant of a special licence."

In *Woods v. Woods* (1), oral evidence was held sufficient, without proof of the entries in the marriage register.

In *Standen v. Standen* (2), it was held that a man who has been in fact married, may be a witness to prove such marriage illegal.

We submit that there was evidence fit to be submitted to the jury.

[They also referred to *Rex v. Hammer* (3), *Thelwall v. Yelverton* (4), *Reg. v. Millis* (5), and *In re Knox* (6).]

Murphy, K.C., and *Sheil* for the defendant (with them *Lowry, K.C.*) :—

There is no evidence of any valid or legal marriage. Apart from the oral testimony of the alleged husband and wife there has been no attempt made to prove this marriage. There was no entry of the marriage in the register and no certificate is available. It is stated in *Best on Evidence* (9th ed.) p. 305, that in cases where damages are claimed for adultery under the Matrimonial Causes Act, 1857, an actual marriage must be proved, "partly on the ground that the proceeding is in the "nature of a penal one ; but chiefly because it might "otherwise be turned to a bad purpose by persons "giving the name and character of wife to women "to whom they had not been married."

We submit that the evidence of the two spouses is not sufficient to constitute evidence fit to go before the jury. On the facts as they appear in the Judge's notes, the present case is one of the greatest suspicion. Why, we ask, was Father McAleese who, it was alleged, had celebrated the marriage, not called ?

(1) 2 Curt. 516.
(2) 1 Peake 45.
(3) [1923] 2 K.B. 786.
(4) 14 I.C.L.R. 188.
(5) 10 Cl. & Fin. 534.
(6) 23 L.R.I. 542.

C.A. 1933.

McCarthy v. Hastings.

In *Halsbury's Laws of England*, vol. 13, page 446, par. 618, it is stated that "a marriage may be "inferred, not only from the cohabitation of the "parties, but also from the fact that they were treated "as married by their friends and neighbours ; although "where strict proof of this fact is required, *e.g.*, in "bigamy proceedings, such evidence, while admissible, "will not be sufficient."

If this is a correct statement of the law such testimony may be admissible, but will not be sufficient. In an action for criminal conversation the strictest proof is necessary. We submit strongly that such evidence as was given is not sufficient. The sworn evidence of husband and wife is not sufficient to establish a marriage without corroborative evidence. Strict proof is obviously something more than mere statements by the husband and wife that a marriage had taken place. If such testimony is sufficient, that is a departure from what has been decided in actions for criminal conversation.

In *Morris v. Miller* (1), it was held that a marriage in fact must be proved. The Court, did not in that case, define what might or might not be evidence of a marriage in fact. In *Catherwood v. Caslon* (2), it was held that the plaintiff in an action for criminal conversation was bound to prove a marriage valid in all respects, and it is not sufficient *primâ facie* evidence on his part, to show that he and his alleged wife went through a religious ceremony with the *bona fide* intention of thereby contracting a valid marriage, and afterwards lived together as man and wife, in the belief that they had thereby contracted a valid marriage, if in law such marriage was not valid. That was a decision of Parke, B., and shows the strictness of the evidence required in actions for criminal conversation. In *Rex v. Lindsay* (3), the prisoner had been indicted for committing bigamy. The evidence of the marriage given by the prosecution was the certificate of the priest in charge, by whom the parties were married, and a daughter of the prisoner admitted that her

(1) 4 Burr 2057.
(2) 13 M. & W. 261.
(3) 18 T.L.R. 761.

parents were the parties to whom it related. Walton, J., held that the evidence of the first marriage was insufficient. This is a clear decision that the Court is to consider whether the plaintiff has discharged the onus cast upon him, in other words whether he has given strict proof of the marriage.

We suggest that *Morris v. Miller* (1), is a very strong authority in the defendant's favour. It decides that an actual marriage must be proved. The danger pointed out by Lord Mansfield in that case exists in the present case. It is not for the jury to act on *primâ facie* evidence. An action for criminal conversation is in the nature of a criminal proceeding and strict proof of the marriage must be given. Strict proof must mean proof of a valid marriage. In *Morris v. Miller* (1), Lord Mansfield, in delivering the opinion of the Court said: "In prosecutions for bigamy, a "marriage in fact must be proved. No inconvenience "can happen by this determination, but inconvenience "might arise from a contrary determination; which "might render persons liable to actions founded upon "evidence made by the persons themselves who should "bring the action."

It is the function of the Judge to decide whether there is any evidence fit to go before the jury.

The statement in *Faloon's Marriage Law of Ireland* that "a Roman Catholic priest may . . . lawfully "celebrate marriage between two Roman Catholics, "not falling within the 19 Geo. II., c. 13 (Irish), as "heretofore in any place and at any hour, the restric-"tions of 7 & 8 Vic., not applying thereto; but such "marriages cannot be registered by the registrars "under that Act," is not in harmony with the decisions given by the Courts over a long period. *Yelverton v. Longworth* (2), does not support the plaintiff's contention.

Brown, J., was right in directing the jury to find for the defendant.

[They also referred to *Beamish v. Beamish* (3), *Reed v. Passer* (4), *Goodright v. Moss* (5), *Ussher v.*

(1) 4 Burr. 2057.
(2) 11 L.T. (N.S.) 118.
(3) 9 H.L.C. 274.
(4) 1 Peake 303.
(5) 2 Cowp. 591.

C.A. 1933.

McCarthy v. Hastings.

Ussher (1), *Woods v. Woods* (2), and *Thelwall v. Yelverton* (3).

T. J. Campbell, K.C. (in reply) :—

The evidence of the priest is neither required by any statute, nor by common law. The factum of marriage is essentially a jury question.

In *Ussher v. Ussher* (1), Kenny, J., stated in his judgment that he was satisfied that by the common law of England, which was also the common law of Ireland, the presence of a witness at a marriage antecedent to the Reformation was not necessary to give it validity.

In *Morrow v. Morrow* (4), it was held that there is no rule of law precluding a jury in an action for criminal conversation from acting on the uncorroborated evidence of the plaintiff's wife as to acts of adultery committed with the defendant.

In *Smith v. Maxwell* (5), it was held that a marriage in Ireland performed by a clergyman of the Church of England in a private house, was valid, although no evidence was given that any licence had been granted to the parties. There exists positive affirmative evidence on which the jury could have properly found in favour of a subsisting marriage.

[He also referred to *Catherwood v. Caslon* (6).]

Cur. adv. vult.

Sir William Moore, L.C.J.

Feb. 8.

Moore, L.C.J. : This was a new trial motion on behalf of the plaintiff to set aside the verdict and judgment entered by Mr. Justice Brown for the defendant. The learned Judge directed the jury to find against the plaintiff on the ground that there was not at the trial sufficient legal evidence of the marriage between the plaintiff and his wife, Ann Jane McCarthy, to entitle him to leave the issues in the action to the jury. It was proved that since 19th January, 1907, the plaintiff and Ann Jane McCarthy had lived together as man and wife and were generally reputed as such.

(1) [1912] 2 I.R. 445, 461.
(2) 2 Curt. 516.
(3) 14 I.C.L.R. 188.
(4) [1914] 2 I.R. 183.
(5) 1 Ry. & Mood. 80.
(6) 13 M. & W. 261.

The actual evidence given was as follows :—

1st Witness—Robert McCarthy (plaintiff) examined :

" I have not my marriage certificate here." . . .
" I have tried to get a marriage certificate It is not
" registered. Father McAleese married me. He is
" still in charge of the Parish."

Re-examined :

" I went to Father McKillop he could not find any
" certificate in the book."

2nd Witness—Ann Jane McCarthy :

" We were married in January, 1907. Married
" in our own house in Kearney, by Father McGorrian
" and Father McAleese. Father McGorrian is dead.
" Miss McNiece the witness is dead."

The learned Judge proceeds : " I came to the con-
" clusion that as in this case strict proof of a real
" marriage was essential the plaintiff had not dis-
" charged the onus of proof upon him and I directed
" the jury to find the verdict for the defendant."

The question for this Court is whether there was sufficient *primâ facie* proof of a marriage when the foregoing circumstances had been sworn to in Court.

Counsel quoted to us the passage from *Best on Evidence* (Ninth Edition), page 305, to the effect that in prosecutions for bigamy and in proceedings under the Matrimonial Causes Act, 1857, which would correspond with an action like the present, an actual marriage must be proved.

The learned Judge uses the expression that there must be strict proof of a real marriage. This is undoubtedly the law in prosecutions for bigamy and in actions for criminal conversation which correspond to suits under the Matrimonial Causes Act. Here the law insists on legal proof because the proceedings themselves are penal or quasi-penal, *Morris v. Miller* (1). In other cases, where the parties have been living together as man and wife and reputed openly as such, the presumption in favour of *omnia rite acta* applies so strongly that it is admitted as satisfactory evidence without more of a presumed marriage and this applies to the several cases in which descent or title were at

(1) 4 Burr. 2057.

C.A. 1933.

McCarthy v. Hastings.

Sir William Moore, L.C.J.

issue, generally ejectments, and these are collected in *Roscoe's Nisi Prius*, at p. 910, and have been cited to us. It will be remembered that up to 1853 the parties to a civil action could not themselves be called as witnesses, a marriage in a Court of Law prior to that could only be proved (if reputation failed) by a witness to the ceremony. But the parties to the suit were debarred from offering evidence on the ground of their supposed interest, otherwise the trial scene in the celebrated case of *Bardell v. Pickwick* might have been largely extended to the delight of posterity. That ban, however, has been removed and the parties to an action are no longer disqualified as witnesses on the ground of interest in the case.

I have read the wonderful speech of Willes, J., in the House of Lords in the suit of *Beamish v. Beamish* (1), in which with extraordinary research after delving into Church history, he traces from the time of the Saxon Kings the institution of the ceremonial attending marriage in this country, and its essentials of which the chief is that the contract between the parties themselves must have been blessed or at least attended by a priest. I am prepared to hold, with proof tendered that the ceremony had been performed between two Roman Catholics by a duly ordained priest, as the Reverend Mr. McAleese is admitted to be (since the defendant objects to his absence as vital) is *primâ facie* evidence of a legal ceremony between them, and this governs the present case.

In agreeing with Mr. Justice Brown that strict evidence of a marriage ceremony must be given, I think (now that the disability in respect of the parties has been removed) there could be no better evidence than that of the parties themselves as the prime actors in the matter at issue, and that this may amount to evidence of an actual marriage. The jury, however, are far from bound to accept it. In this age since 1863 it is convenient to prove births, deaths and marriages by production of certificates from the Registrar General, but as the event itself may by some accident not be registered, and as all this is evidence

(1) 9 H.L.C. 274.

C.A. 1933.

McCarthy v. Hastings.

Sir William Moore, L.C.J.

by statute, the absence of such a certificate does not invalidate the ceremony or prevent the proof in Court at canon or common law if further evidence is forthcoming. I am of the opinion that the husband and wife who were themselves the principals in the ceremony were entitled to prove it as deeds done by themselves with or without the evidence in Court of the clergyman, who, they swore, solemnized it, or a certificate from him, and that this evidence of theirs is equivalent in law to a strict or actual proof sufficient to entitle the jury to consider its truth or falsity as the case might be, and therefore that the case should not have been withdrawn from them on this ground. It is purely a question of fact for a fresh jury to decide.

As there must be a new trial I might perhaps refer to the case of *Morrow v. Morrow* (1), where in a similar form of action a Divisional Court considered a conflict between this old canon law and the law in our Courts as to the necessity for corroboration of the wife's evidence when it amounted to a confession.

We are, however, agreed that the appeal is to be allowed and a new trial ordered; the costs of both parties in the previous trial, and of the appellant only in this appeal to be costs in the cause.

Best, L.J.

Best, L.J.: The question for decision in this case is whether at the trial of the action which was brought to recover damages for criminal conversation with the plaintiff's wife any evidence was given by or on behalf of the plaintiff from which the jury would be entitled to find that the plaintiff was in fact and in law married to the woman in respect of whose alleged debauchery he asked for damages.

The action was tried by Brown, J., and a special jury of the city of Belfast on the 14th day of November, 1932.

The factum of marriage and its legality were specifically put in issue by the defendant's pleas: (*a*) The defendant denies that the plaintiff is, or ever was, the lawful husband of Ann Jane McCarthy named in the statement of claim, and (*b*) the plaintiff was not

(1) [1914] 2 I.R. 183, 188.

C.A. 1933.

McCarthy v. Hastings.

Best, L.J.

lawfully married to the said Ann Jane McCarthy, as alleged, or at all.

Evidence of marriage was given by the plaintiff and by his alleged wife; it is very short and may be set out verbatim.

Robert McCarthy said: "Married 19th January, "1907."

This was the only piece of direct evidence of marriage given by plaintiff.

Cross-examined by Mr. Lowry:

"I have not my marriage certificate here." After cross-examination on other features of the case he said: "I have tried to get a marriage certificate. "It is not registered. Father McAleese married me. "He is still in charge of the parish." Re-examined, plaintiff said: "I went to Father McKillop. "He could not find any certificate in the book."

Ann Jane McCarthy examined, said:

"Wife of plaintiff. Married January, 1907. "Married in our own house in Kearney by Father "McGorrian and Father McAleese. Father "McGorrian is dead. Miss McNiece, the witness, "is dead."

There is a note opposite the evidence "Married in "our own house in Kearney by Father McGorrian and "Father McAleese," as follows: "Lowry objects," but the evidence was admitted notwithstanding the objection.

No other witness was examined nor was any other evidence tendered on behalf of the plaintiff whose case was then closed.

Mr. Lowry asked for a direction on the ground that there was no evidence of the marriage fit to go to the Jury.

Mr. Campbell submitted that there was some evidence—the testimony of the spouses.

The learned Judge reports that he came to the conclusion that as in this case strict proof of a real marriage was essential the plaintiff had not discharged the onus of proof upon him and he directed the jury to find a verdict for the defendant, which they accordingly did.

The ground on which the application for a direction was based is stated in the registrar's certificate to be that plaintiff failed to produce the certificate or other legal evidence of his marriage to his said alleged wife.

In order to sustain an action for criminal conversation there must be evidence of celebration of the marriage, as evidence of acknowledgment, cohabitation or repute will not suffice. In *Morris v. Miller* (1), Lord Mansfield says : " We are all clearly of opinion, that in " this kind of action, an action for criminal conversation " with the plaintiff's wife, there must be evidence of a " marriage in fact : acknowledgment, cohabitation, " and reputation, are not sufficient to maintain this " action," and he adds the significant words—" But " we do not at present define what may or may not " be evidence of a marriage in fact." In that case, the report states the parties were married at May-Fair Chapel, the register or books could not be admitted in evidence. Keith, who married them, was transported, and the clerk, who was present, was dead. So that this plaintiff could not prove the actual marriage by any evidence as the law then stood, he himself not being at that time (1767) a competent witness in his own case.

Now if it be the fact that these two people, the plaintiff and his alleged wife, agreed in the presence of a priest in Holy Orders, *per verba de praesenti* to be and become there and then husband and wife they were in fact legally married according to the common law of England, which, in this matter, is the common law of Ireland also. See *Reg. v. Millis* (2).

The question then arises as to how the factum of marriage and its legality are to be proved. Mr. Murphy argued that the priest should have been called or that a certificate in accordance with the provisions of the Registration of Marriages (Ireland) Act, 1863, 26 & 27 Vict., C. 90, Sec. 11, should have been produced, and that failing proof in one or other of these ways, or by a witness who had been present, no legal proof of a marriage celebrated in fact or in law was given by or on behalf of the plaintiff. The marriage, if it took place, may in fact never have been registered, but its validity

(1) 4 Burr. 2057, 2059. (2) 10 Cl. & Fin. 534.

C.A. 1933.

McCarthy v. Hastings.

Best, L.J.

was not affected by any omission to register, for the last section (27) of the Act just mentioned provides that—"Nothing in this Act contained shall affect the "Law of Marriage in Ireland."

The marriage might have been proved by Miss McNiece if living and willing to testify, it might have been proved by the priest or by other persons, if such there were, who happened to be present at the ceremony. If the marriage could be strictly proved by any of these people, as in my opinion it could, what is there in any statute, or in any principle of law, or where is the authority, to prevent the parties themselves from giving evidence, which, if believed, would likewise strictly prove their marriage? On what principle is such evidence to be withdrawn from the jury's consideration? These questions might be partially answered by pointing to the closing words of Lord Mansfield's judgment in the case already cited, *Morris v. Miller* (1), where he says that "inconvenience might "arise from a contrary determination; which might "render persons liable to actions founded upon evidence "made by the persons themselves who should bring "the action," but surely it is a matter for the jury to say whether the evidence of the plaintiff and his alleged wife, unsupported as it is in this case by any other evidence, is to be believed. Admittedly there is a living person, the priest, who, if plaintiff's evidence is to be believed, could possibly have been called to prove the fact and validity of the marriage. No explanation was given to the trial Judge or to this Court as to why he was not called; it may have been that he had no recollection of the matter though this is hardly credible if a marriage in fact took place in his presence, or it may have been that he is unwilling to give evidence in these Courts, though why he should not be compelled to do so, especially if he is in a position to give evidence of a vital character, I fail to see. All these matters, in my opinion, affect not the admissibility but the weight of the evidence given for the plaintiff and I can see no reason in principle why a marriage should not be strictly proved by one of the parties to it just

(1) 4 Burr. 2057, 2059.

as it might be by any other witness who was present at the ceremony.

In the case of the *Reg. v. Griffin* (1), Fitzgerald, B., is reported as saying: "What is recognised as the "essence of matrimony, *ipsum matrimonium*, in this "sense by the law of England is the present irrevocable "pledging of the service of the person of each of the "parties to the contract, to the other. I use the word "'person' in a large sense; and when I say 'irrevoc-"'able' I mean irrevocable by mutual consent, or at "the will of either. But the common law of England "made of the essence of the contract the presence of a "clerk in holy orders when such pledge was made. "No marriage made in England, therefore, was valid "which was not so celebrated, and the same was true in "Ireland, and elsewhere in English dominions where "the common law of England prevailed." For these propositions, the learned Baron says, the case of *Reg. v. Millis* (2), is an authority.

Now if this be a correct statement of the law, as I take it to be, why is it not possible and allowable for any and every circumstance here set forth to be proved by one or other or both of the parties whose marriage is in question? I can see no reason for rejecting evidence of this character, but acknowledge that whilst its admissibility is one matter, its value is quite another matter and one exclusively for the jury.

In my opinion there should be a new trial of the action, the costs of both parties in the first trial and of the appellant only in this appeal to be costs in the cause.

Solicitor for the plaintiff: *T. Erskine Alexander.*
Solicitor for the defendant: *Johnston & McCourt.*

J. McC.

(1) 4 L.R.I. 497, 508, 509.
(2) 10 Cl. & Fin. 534.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS (1).

April 27, 28. June 2, 23.

Negligence—Harbour Authority—Duty towards persons using their premises—Workman employed by Shipowners—Licensee or Invitee—Invitation, mixed question of law and fact—Injury by Accident—Roadway—Obstruction consisting of shore or log used for docking vessels—Functions of Judge and Jury.

The plaintiff, a greaser and fireman, employed by a Shipbuilding Company, was working on a motor ship moored at a wharf belonging to the defendants, who were paid by the Shipbuilding Company for the use of the wharf, but were in no way brought into privity with the plaintiff.

At the end of his day's work the plaintiff handed in his check at the check office, and started for the tramway terminus situate outside the defendants' property, to take a tram home. On his way he tripped over a shore used for docking vessels, and sustained injury. He brought an action against the defendants, alleging negligence and breach of duty on their part in and about the care, control, and management of the roadway where the accident occurred.

The defendants alleged that the plaintiff ought to have gone from the check office to the tramway terminus by a well-defined, well-kept and well-lighted roadway or track, and that the plaintiff, in taking the route he did, did so to save himself travelling an extra distance of about forty yards, and took the risk of meeting any obstruction that might be met on that route.

The evidence for the plaintiff was that the route he took was constantly used by workmen going between the tramway terminus and the wharf. Defendants' witnesses admitted this but said that this portion of the defendants' property was constantly used for storing shores, keel blocks, and other tackle, and that the route plaintiff should have taken was always clear, and was the recognized roadway to the wharf.

The jury found that the plaintiff was not invited, but was licensed, by the defendants to use the route; that the shore constituted a dangerous obstruction on this route, and that the defendants knew or ought to have known of this obstruction; that the defendants were not negligent in placing or permitting to be placed the shore on the route, but that they were negligent in not removing the shore, and in not properly lighting the route; that the area through which the plaintiff had passed was used by the defendants for the carriage of shores, keel blocks, and other tackle; that the plaintiff was aware or should have been aware that the area

(1) In the Court of Appeal before Andrews and Best, L.JJ., and Megaw, J.

was liable to such obstruction; that the plaintiff voluntarily took the risk of crossing this area, and that he took reasonable care for his own safety; and they assessed the damages at £100.

On these findings the Judge gave judgment for the plaintiff.

Held, by the Court of Appeal (Andrews and Best, L.JJ., and Megaw, J.), that the plaintiff was debarred from the recovery of damages by the findings of the jury in reference to his state of knowledge of the dangers to be anticipated in the area through which he chose voluntarily to walk in the dark, although another safe and well-lighted route, which was only forty yards longer, was provided for him. In these circumstances, if he chose to walk in the dark, he walked at his peril.

Held further, that having regard to the other findings of the jury, no such duty was owed by the defendants as was implied in the question of negligence.

The following statement of the facts is taken from the judgment of Andrews, L.J.

On 24th November, 1930, the plaintiff, who was then a greaser and fireman in the employment of Messrs. Harland & Wolff, Ltd., was one of about 100 men who left their work on a ship called the "Laganbank," at about 8-30 p.m. This ship was moored at the Clarence wharf, which is separated from the Thompson graving dock by a quay or portion of ground approximately 100 feet in width. The southern end of this quay was divided into two parts by a long pumping station with detached chimney adjoining, and in line with it at its northern end. The portion on the eastern side was forty-one feet wide whilst that on the western side was thirty-six feet wide. There were several electric light standards on the quay. Those on the west or Clarence wharf side of the pumping station were lighted, but those on the east or Thompson dock side of it were not lighted.

The plaintiff, who had been working at ships at the Clarence wharf for fifteen years, admittedly knew the place, including the position of the lights and mooring posts, very well, but he was working for the first time that day on this particular boat. He proceeded from the gangway to the check office which was situate at the northern end of the pumping station not far from the chimney. Having handed in his check, he went

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

along the unlighted side of the pumping station, that is between it and the Thompson dock, accompanied, as he swore, by all the other men. A shore or log used for docking vessels in the Thompson dock was lying across this route. In the "pitch darkness" and mizzling rain, plaintiff, who was "walking pretty fast," to get a seat on the tram, whose terminus was at the end of the Queen's Road, failed to see the shore, tripped over it, fell, and broke his arm. Shores in use at the dock are for the most part of considerable size, and require four men to carry them. The route followed by the plaintiff to the east of the pumping station was shorter by some forty yards than that on its western side. It is the route, he said, he always followed, whether coming from ships at the Clarence wharf or in the Thompson dock. Shores are, he admitted, left on the bank (*i.e.*, quay) according to the position of the dock where the vessel happened to be; but, he added, he never saw any shores at the place where he fell or opposite the pumping station. Three men, Megaw, Fisher and Hill, were with him when he fell, and the latter two picked him up, but none of them was called to give evidence. Plaintiff's witnesses, however, included a man called Ferris who said he was behind plaintiff, evidently a considerable distance, and did not see him fall. He swore that he always used this eastern route. He also tripped over a shore and fell, and when he came in in the morning he didn't see the shore. He admitted in cross-examination that "the other road," *i.e.*, the western route, is well lighted and there is no obstruction on it; but he added that he never saw a shore between the pumping station and the dock, *i.e.*, on the eastern side. Other witnesses corroborated, including Joseph Harris, who, in a hurry for the tram, also tripped over the shore which, he said, he had never seen there before, and the place had been clear in the morning when he was coming in.

At the close of the plaintiff's case, the Attorney-General asked for a direction on behalf of the defendants on the ground that there was no evidence of any invitation by the defendants to the plaintiff to use the passage east of the pumping station, and that

the plaintiff was a mere licensee and not an invitee. The application was refused.

The witnesses for the defence, who included their Consulting Engineer, their Harbour Master and Assistant Harbour Master, a foreman shipwright from Messrs. Harland & Wolff, Ltd., proved that they must have an area for working the dock, and that gear was spread on the cinder area completely around it ; that shores, which are owned by the defendants, and about 350 in number, when not in use are laid on the cinders in addition to keel blocks, keel block caps, trestles and planks, all of which had been seen between the pumping station and the dock. Other obstacles on the route consisted of mooring pawles, steps to docks, and pits for penstocks. Men from the dock, it was proved, go on both sides of the pumping station. Captain McIntyre (the Harbour Master) went so far as to say that this area is never free from gear between the pumping station and the dock, such gear including shores, keel blocks and trestles, plate angles, and other material for ships, and scrap taken off ships. He further added that quite frequently men from the wharf go on the east side of the station and quite a lot of them go on the west side, which was always clear and was the recognized roadway to Clarence wharf. Magowan, Workman & Clark's foreman, with twenty-four years' experience, said he had never yet seen the area between the station and the dock without shores, and that he had himself often placed them there. The evidence of Harland & Wolff's Assistant Manager, who had eleven years' experience, was to the like effect. Mahood, the Deputy Harbour Master, said that on 24th November he saw a shore in the position alleged, and that if this had been a roadway he would have moved it.

At the close of the defendant's evidence, the Attorney-General repeated his requisition for a direction, submitting that, as the plaintiff was not an invitee, the defendants owed him no duty to keep the passage between the pumping station and Thompson dock either lighted or free from obstruction, and that there was no evidence of negligence by the defendants proper to be submitted to the jury. His application was again refused.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

The following were the questions put to the jury with their answers :—

1. Was the plaintiff (*a*) invited by the defendants ? Answer : No. or (*b*) licensed by the defendants to use the route which he took on the 24th of November, 1930 ? Answer : Yes.

2. (*a*) Did the shore on that date constitute a dangerous obstruction on this route ? Answer : Yes. (*b*) If so, did the defendants know or ought the defendants to have known of such obstruction ? Answer : Yes.

3. Were the defendants negligent (*a*) In placing or permitting to be placed the shore on the route ? Answer : No. (*b*) In not removing the shore from this route ? Answer : Yes. (*c*) In not properly lighting this route ? Answer : Yes.

4. Was the area between the pumping station and the Thompson dock used by the defendants for the storage of (*a*) shores ? Answer : Yes. (*b*) keel blocks ? Answer : Yes. (*c*) other tackle ? Answer : Yes.

5. (*a*) Was the plaintiff aware ? Answer : Yes. or (*b*) Should he have been aware that the area was liable to such obstruction ? Answer : Yes.

6. If either 5 (*a*) or (*b*) is answered in the affirmative, did the plaintiff voluntarily take the risk of crossing this area ? Answer : Yes.

7. Did the plaintiff take reasonable care for his own safety ? Answer : Yes.

8. Damages ? £100.

The Attorney-General on behalf of the defendants objected to the Judge's, Brown, J., direction to the jury that they should interpret questions 4, 5 and 6 as referring to at or about the time at which the accident occurred ; and asked him to tell the jury that if they believed that if the plaintiff had general knowledge of the liability of the area in front of the pumping station to be obstructed they were entitled to answer questions 4, 5 and 6 in the affirmative. The Judge thereupon suggested that question 4 be altered by adding " liable to be " before " used," to which the Attorney-General assented, but Mr. Murphy would not agree. The Judge recalled the jury and told them

that there was no evidence that plaintiff went to his work on that morning by the east side of the station, and that with regard to question 4 they should not confine their consideration to the 24th November, but to "in or about that time" and that they were to consider whether that area was liable to be used in or about that time for storage, etc. Mr. Murphy objected to the phrase "was it liable to be used." Later, the jury came out and asked was question 6 solely referable to this one shore or to shores generally, to which the learned Judge replied that it was referable to any shores or gear that would ordinarily be placed in the position that this shore was placed. To this Mr. McSparran objected on behalf of the plaintiff, submitting that the Judge should have directed the jury that the risk referred to was the risk of the particular obstruction which caused the accident.

On the findings of the jury Brown, J., gave judgment for the plaintiff.

The defendants applied to the Court of Appeal for an order that the judgment entered for the plaintiff should be set aside, and that judgment might be entered for them on the grounds, that the answers of the jury to the several questions submitted to them by the Judge constituted a verdict for the defendants; that there was no evidence, or, alternatively, no sufficient evidence upon which the jury could properly find the answers given by them to questions 2 (*a*), 2 (*b*), 3 (*b*), 3 (*c*) and 7; that the answers given by the jury to questions 2 (*a*), 2 (*b*), 3 (*b*), 3 (*c*) and 7 were given against the weight of evidence; that the trial judge ought not to have left to the jury questions 2 (*a*), 2 (*b*), 3 (*b*), 3 (*c*) and 7; that the answers given by the jury to the above questions were irrelevant to the proper determination of the action and should be set aside; that the Judge should have left to the jury only questions 4, 5 and 6; that the Judge ought to have directed in favour of the defendants at the conclusion of the plaintiff's case; that the Judge ought to have complied with the requisitions made on behalf of the defendants; that the verdict and judgment was against the evidence and the weight

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

of evidence ; or, in the alternative, that a new trial of the action might be directed.

There was a cross notice of motion by the plaintiff for an order that the answers of the jury to questions 1 (*a*), 4 (*a*), 4 (*b*), 4 (*c*), 5 (*a*), 5 (*b*) and 6 be set aside on the grounds (*a*) that there was no evidence, or, alternatively, no sufficient evidence upon which the jury could properly find the answer given to 1 (*a*) ; (*b*) that that answer was given against the weight of evidence ; (*c*) that the Judge should not have put to the jury questions 4 (*a*), (*b*), (*c*) 5 (*a*), (*b*) or 6 or any of the said questions ; (*d*) that the Judge should have complied with the several requisitions made on behalf of the plaintiff ; and (*e*) further in respect of question 6 and the answer to it, that the Judge should have directed the jury that there was no evidence to support an answer in the affirmative to that question.

The Attorney-General (*A. B. Babington, K.C.*) and *Black, K.C.*, in support of the motion (with them *J. D. Chambers*) :—

The case for the defendants is that the plaintiff took the route with all its defects, and that the route taken was through a working area to the knowledge of the plaintiff.

We submit that the answers of the jury to questions 1 (*a*), 1 (*b*) 4 and 5 constitute a verdict for the defendants, apart altogether from the defence of *volenti non fit injuria*. The plaintiff was a licensee when using this route. The doctrine of invitation has certain limits. The question is whether the plaintiff was within those limits or outside them. He had to make his way as best he could as he did not follow the recognised route. In such a case we submit that the responsibility for the accident lay upon the plaintiff. The present case resembles somewhat *Fairman v. Perpetual Building Society* (1), where it was held that the only duty owed by the defendants to the plaintiff was not to expose her to a concealed danger or trap.

(1) [1923] A.C. 74.

Once it is established that the plaintiff is a licensee, it lies upon him to show that there was some unusual danger in the nature of a trap to which his injuries are due. The law on this point is stated by Willes, J., in *Corby v. Hill* (1).

We rely on the words used by Channell, B., and Wilde, B., in *Bolch v. Smith* (2).

In *Gautret v. Egerton* (3), Willes, J., said "To bring "the case within the category of actionable negligence, "some wrongful act must be shewn, or a breach of "some positive duty; otherwise a man who allows "strangers to roam over his property would be held "to be answerable for not protecting them against "any danger which they might encounter whilst using "the licence."

The question of unusual danger or of a "trap" must be considered with reference to the particular complaint which has been made. We rely on the words used by Buckley, L.J., and Phillimore, L.J., in *Norman v. Great Western Railway* (4). In *Indermaur v. Dames* (5), the question of whether the plaintiff had or had not knowledge of the danger was treated as of great importance. In the present case the plaintiff cannot complain, as the jury found that he had knowledge of the danger. The result of the cases is well summarised in *Latham v. R. Johnson and Nephew, Limited* (6), by Hamilton, L.J. In the case of a licensee, unless there are concealed sources of danger the defendants are not liable for injuries caused by an obstruction of which the plaintiff must have known. There is no authority for the suggestion that the plaintiff had moved from the class of licensees into that of invitees.

In *Mersey Docks and Harbour Board v. Procter* (7), Lord Sumner said: "Concealed dangers, as the term "shows, are relative to the knowledge and the capacity "of the person who suffers by them, and in this matter

(1) 4 C.B. (N.S.) 556, 567.
(2) 7 H. & N. 736.
(3) L.R. 2 C.P. 371, 375.
(4) [1915] 1 K.B. 584, 591, 592, 594, 595.
(5) L.R. 1 C.P. 274.
(6) [1913] 1 K.B. 398, 410.
(7) [1923] A.C. 253, 276.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

"he must use his knowledge and his good sense "reasonably and must act accordingly."

The findings of the jury amount to a clear verdict for the defendants.

The answer to question 6 when read along with the answers to questions 4 and 5 amount to a verdict for the defendants on the point of *volenti non fit injuria.*

In the present case the jury has found that this area is used for the storage of shores and other tackle. The plaintiff must have known how the Thompson dock is managed.

We submit that there was ample evidence that this area between the pumping station and the Thompson dock was used for the storage of shores. In *Cavalier v. Pope* (1), Lord Atkinson said in his speech in the House of Lords, "It is, I think, clear that the case "does not come within the principle of *Indermaur v.* "*Dames* (2) and the cases which followed it down to "*Earl v. Lubback* (3), because one of the essential facts "necessary to bring a case within that principle is "that the injured person must not have had knowledge "or notice of the existence of the danger through "which he has suffered. If he knows of the danger "and runs the risk he has no cause of action." In *Mersey Docks and Harbour Board v. Procter* (4), Lord Sumner arrived at the conclusion that there was no trap, because "a reasonable man would have known "that such as it was, the danger was one to be "reckoned with."

In *Brooks v. Courtney* (5), it was held that if a party, whether a servant or otherwise, undertakes an employment which involves danger of accident, and an accident occur, he cannot sue his employer for damages, although such accident might have been avoided by additional care on the part of the master. In the present case the plaintiff was well aware of the danger. He knew that the area was liable to obstruction, and voluntarily undertook the risk. This area was not a thoroughfare but a working and storage area. The

(1) [1906] A.C. 428, 432.
(2) L.R. 1 C.P. 274 ; L.R.2 C.P. 311.
(3) [1905] 1 K.B. 253.
(4) [1923] A.C. 253, 278.
(5) 20 L.T. (N.S.) 440.

defendants never provided a route through this area, a route was provided on the west side. The plaintiff was a mere licensee, and there is an actual finding of the jury to that effect. This is important, as responsibility towards an invitee is more onerous than towards a licensee. As to the position of licensees we rely on the words used by Lord Sumner in *Mersey Docks and Harbour Board v. Procter.* (1) The plaintiff cannot succeed unless he proves that the danger was unexpected. In *Coleshill v. Manchester Corporation* (2), it was held that where there was nothing in the nature of a concealed danger or trap the defendants were not liable to the plaintiff, who was a mere licensee. In that case Eve, J., said that " a concealed danger is one " which is not known to the licensee or obvious to the " licensee using reasonable care."

In *Brackley v. Midland Railway* (3), it was held that the duty of an inviter towards an invitee arises only in respect of dangers of which the invitee has no knowledge or notice.

There is ample evidence to support the jury's finding that the defendant was only a licensee. There is also ample evidence to support the finding of the jury that the area between the pumping station and the Thompson dock was used by the defendants for the storage of shores, keel blocks, and other tackle. The jury have also found that the area was liable to obstruction, and indeed the plaintiff's own statements brought home his knowledge of this area's liability to obstruction. It is evident that the jury accepted the defendant's evidence as to how this area was used.

We submit that the findings of the jury amounted to a clear verdict for the defendants.

[They also referred to *Wilson, Sons & Co., Ltd. v. Barry Railway* (4).

Murphy, K.C., and *McSparran* for the plaintiff :—

The route plaintiff took was shorter by forty yards than the route on the west side. We submit that this

(1) [1923] A.C. 253, 274.
(2) [1928] 1 K.B. 776, 796.
(3) 85 L.J. (K.B.) 1596.
(4) 86 L.J. (K.B.) 432.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

was a working area. There is no evidence as to how the plaintiff came to his work. A duty was cast upon the defendants so to light that portion of their property that persons using the route in question should be able to do so with provided light. This was an area which the defendants were obliged to light.

The dictum of Christian, L.J., in *Greene v. Greene* (1), that " Bewilderment rather than enlightenment would, " I fear, attend upon any effort to find a path through " the tangle of decisions by which the subject is " encompassed," applies to the present case. We rely on *Holmes v. North Eastern Railway Co.* (2), where it was held that the plaintiff was not a mere licensee, but was engaged, with the consent and by the invitation of the defendants, in a transaction of common interest to both parties, and was therefore entitled to require that the defendant's premises should be in a reasonably secure condition. In the present case, the relationship of the plaintiff to the defendant was not that of a mere licensee. The present case belongs to the same class as *Indermaur v. Dames* (3), as that class includes persons who go upon business which concerns the occupier, and upon his invitation, express or implied. In *Thatcher v. Great Western Railway Co.* (4), Lord Esher, M.R., said that " if a person was on the premises " of another with that other's consent, the latter had a " duty to take reasonable care not to act in such a way " as to cause personal injury to the former." In the same case Lopes, L.J., said that he thought that " without using the word ' licensee ' the law on the " subject might be stated thus :—If a person permitted " another to come on his premises, and knew him to be " on his premises, it was his duty to take reasonable " care not to injure him. If there was evidence of " want of such care, it was the duty of the judge to " leave the case to the jury." We rely on *Sutcliffe v. Clients Investment Co.* (5).

We submit that as a matter of law, no question as to whether the plaintiff was a licensee or invitee should

(1) I.R. 3 Eq. 629, 637.
(2) L.R. 4 Ex. 254.
(3) L.R. 1 C.P. 274.
(4) 10 T.L. R. 13.
(5) [1924] 2 K.B. 746.

have been put to the jury. The plaintiff's position in law was that of an invitee. If he was not an invitee, he was at least a licensee with an interest. We rely on *Butts v. Goddard* (1), where Manisty, J., said: "the "defendants ought to have their premises in such a "state that people coming to transact business with "them had a right to suppose those premises to be in a "reasonably safe condition." In *Lax v. Corporation of Darlington* (2), Bramwell, L.J., said the defendants were "bound to have the place in a non-dangerous "condition for those who come there for any lawful "purpose on certain occasions." We also rely on *Baldock v. Westminster City Council* (3). In *Corby v. Hill* (4), Willes, J., said: "One who comes upon "another's land by the owner's permission or invitation "has a right to expect that the owner will not dig a "pit thereon, or permit another to dig a pit "thereon, so that persons lawfully coming there "may receive injury." The whole point of the decision in *Bolch v. Smith* (5), was that the defect in the fencing was apparent. *Gautret v. Egerton* (6), is quite different from the present case. There as Willes, J., said, the consequences of certain accidents were sought to be visited upon the defendants, because they permitted a way to be used, with the condition of which for anything that appeared, those who suffered the injury were perfectly well acquainted. In that case Willes, J., said that every man was bound not wilfully to deceive others, or do any act which might place them in danger. The only point decided in *Norman v. Great Western Railway Co.* (7), was that the duty of a railway company towards persons resorting to their premises and yards in the ordinary course of business is not higher than that of the occupier of private premises towards invitees resorting to such premises in the ordinary course of business. In his judgment in *Indermaur v. Dames* (8), Willes, J., pointed out that persons who resort to premises in the

(1) 4 T.L.R. 193.
(2) 5 Ex.D. 28.
(3) 35 T.L.R. 188.
(4) 4 C.B. (N.S.) 556, 567.
(5) 7 H. & N. 737.
(6) L.R. 2 C.P. 371.
(7) [1915] 1 K.B. 584.
(8) L.R. 1 C.P. 274.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

course of business are in the position of invitees. All that is necessary to constitute an invitee is a common interest. The plaintiff in the present case was for all purposes in the position of an invitee. We submit that the whole case has proceeded on the basis of the existence of a common interest. In *Coleshill v. Manchester Corporation* (1), Atkin, L.J., referred to the words used by Scrutton, L.J., in *Hayward v. Drury Lane Theatre and Moss Empires* (2), where he described a trap as "a danger which a person who does not know "the premises could not avoid by reasonable care "and skill."

The findings of Shearman, J., in *Fairman v. Perpetual Investment Building Society* (3), differentiate that case from the present. The shore in the present case was not obvious.

In his speech in the House of Lords in *Fairman v. Perpetual Investment Building Society* (1), Lord Wrenbury said: "If there is some danger of which "the owner has knowledge, or ought to have knowledge, "and which is not known to the licensee or obvious to "the licensee using reasonable care, the owner owes a "duty to the licensee to inform him of it. If the "danger is not obvious, it if is a concealed danger, "and the licencee is injured, the owner is liable." We submit that this passage is applicable to the present case.

In *Mersey Docks and Harbour Board v. Procter* (1), Viscount Cave, L.C., said in his speech in the House of Lords that the appellant's duty to the deceased was "to use reasonable care for his safety while he was "upon their land and acting in compliance with their "invitation." We are not aware of any case where the Court has sought to limit the duty in circumstances in any way approximating to the present case. We contend that in the present case the danger was unknown to the plaintiff. The principle applicable is well summed up by Viscount Cave, L.C., in *Mersey*

(1) [1928] 1 K.B. 776, 792.
(2) [1917] 2 K.B. 899, 913.
(3) [1923] A.C. 74.
(4) [1923] A.C. 253, 259, 260.

Docks and Harbour Board v. Procter (1), where he says : " that where a landowner invites or induces a person to " go upon his land, not as a bare licensee but for some " purpose in which both have an interest, he must " make reasonable provision for that person's safety." *Brackley v. Midland Railway* (2), is distinguishable from the present case.

The findings of the jury in the present case must be considered subject to the direction of the trial judge.

The plaintiff had all the rights of an invitee, he was a licensee with an interest. There is ample evidence to justify the findings of the jury that the shore constituted a dangerous obstruction and that the defendants knew or ought to have known of such obstruction. The principle established in *McKee v. Malcolmson* (3), should be applied to the present case.

We submit that the full and appreciated knowledge of the plaintiff was entirely lacking and that the plaintiff did not accept this risk.

It is perfectly clear that there is a distinction in law between a bare licensee and a licensee coupled with an interest. The law on this subject is correctly stated in *Addison's Law of Torts* (eighth edition) page 722, where it is said that the occupier " must not set a trap " for his licensee." We submit that in the present case even if the plaintiff had been a bare licensee he was entitled to the jury's verdict. If the findings of the jury stand, the plaintiff is entitled to a verdict in his favour.

We strongly contend that the plaintiff never knew and appreciated the risks involved. Where negligence exists there can be no appreciation of the risk. On this point we rely on the words used by Lord Bramwell in *Smith v. Baker & Sons* (4). As Andrews, L.J., said in *McKee v. Malcolmson* (5), " Knowledge of the " danger requisite to constitute a defence must not " merely be that there is some degree of risk involved ; " there must be an appreciation of its full extent." In the present case all that the plaintiff could have

(1) 1923 A.C. 253, 259, 260.
(2) 85 L.J. (K.B.) 1596.
(3) [1925] N.I. 120.
(4) [1891] A.C. 325, 344.
(5) [1925] N.I. 120, 137.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

known was that he was walking over an area that was liable to be obstructed. There is no evidence that the plaintiff appreciated the risk of the shore being in the position in which it was. The point is dealt with in *Beven on Negligence*, vol. 1, p. 563, where it is stated : "It cannot be that, having granted permission to use a "way subject to existing dangers he (the grantee) "is to be allowed to do any further act to endanger "the safety of the person using the way." The jury found that there was a dangerous obstruction on the route. The plaintiff did not take the risk that the shore was going to be placed across what had been his usual path to work.

[They also referred to *Brooks v. Courtney* (1), and *Wilson v. Barry Railway Company* (2).

The Attorney-General (in reply) :—

The defendants have contended all along that before coming to the question of negligence, the question of duty must be dealt with. The plaintiff should have been aware of the obstruction. If the plaintiff is a licensee the only liability of the defendants is not to lay a trap for him. No trap was laid for him. An invitee is not entitled to have the place on which he walks kept as a thoroughfare. The route taken by the plaintiff is not a public highway.

We submit that where a man is employed at the Belfast docks and there is a recognised route to the docks, if he goes to his work by an unrecognised route and there is an accident, the defendants are not liable.

In *Holmes v. The North Eastern Railway Company* (3), the plaintiff was an invitee, and in *Sutcliffe v. Clients Investment Co., Ltd.* (4), it was held that the plaintiff's husband who had been killed was more than a bare licensee and was at least a licensee with an interest with the same rights as an invitee. We ask that the judgment entered up by Brown, J., should be set aside and that judgment should be entered for the defendants.

Cur adv. vult.

(1) 20 L.T. (N.S.) 440.
(2) 116 L.T. (N.S.) 71.
(3) L.R. 4 Ex. 254.
(4) [1924] 2 K.B. 746.

ANDREWS, L.J.: In this action the plaintiff claimed damages for personal injuries sustained by him through the alleged negligence and breach of duty of the defendants in and about the care, control and management of an alleged roadway situate between the Clarence wharf and the Queen's Road. On 24th November, 1930, the plaintiff, who was then a greaser and fireman in the employment of Messrs. Harland & Wolff, was one of about one hundred men who left their work on a boat called the "Laganbank," at about 8-30 p.m. This boat was moored at the Clarence wharf, which is separated from the Thompson graving dock by a quay or portion of ground approximately one hundred feet in width. The southern end of this quay was divided into two parts by a long pumping station with detached chimney adjoining and in line with it at its northern end. The portion on the eastern side was forty-one feet wide, whilst that on the western side was thirty-six feet. There were several electric light standards on the quay. Those on the west or Clarence wharf side of the pumping station were lighted, but those on the east or Thompson dock side of it were not lighted.

The plaintiff, who had been working at ships at the Clarence wharf for fifteen years, admittedly knew the place, including the position of the lights and mooring posts, very well, but he was working for the first time that day on this particular boat. He proceeded from the gangway to the check office which was situate at the northern end of the pumping station not far from the chimney. Having handed in his check, he went along the unlighted side of the pumping station, that is, between it and the Thompson dock, accompanied, as he swore, by all the other men. A shore or log used for docking vessels in the Thompson dock was lying across his route. In the "pitch darkness" and mizzling rain, plaintiff, who was "walking pretty fast" to get a seat on the tram, whose terminus was at the end of the Queen's Road, failed to see the shore, tripped over it, fell, and broke his arm. Shores in use at the dock are for the most part of considerable size, and require four men to carry them. The route

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

ANDREWS, L.J.

followed by the plaintiff to the east of the pumping station was shorter by some forty yards than that on its western side. It is the route, he said, he always followed, whether coming from ships at the Clarence wharf or in the Thompson dock. Shores are, he admitted, left on the bank (*i.e.*, quay) according to the position of the dock that the vessel happened to be in ; but, he added, he never saw any shores at the place where he fell or opposite the pumping station. Three men, Megaw, Fisher and Hill, were with him when he fell, and the latter two picked him up, but none of them was called to give evidence. Plaintiff's witnesses, however, included a man called Ferris who said he was behind plaintiff, evidently a considerable distance, and did not see him fall. He swore that he always used this eastern route. He also tripped over a shore and fell, and when he came in in the morning he didn't see the shore. He admitted in cross-examination that "the other road," *i.e.*, the western route, is well lighted and there is no obstruction on it ; but he added that he never saw a shore between the pumping station and the dock (*i.e.*, on eastern side). Other witnesses corroborated, including Joseph Harris, who, in a hurry for the tram, also tripped over the shore which he said, he had never seen there before, and the place had been clear in the morning when he was coming in.

At the close of the plaintiff's case, the Attorney-General asked for a direction on behalf of the defendants on the ground that there was no evidence of any invitation by the defendants to the plaintiff to use the passage east of the pumping station, and that plaintiff was a mere licensee and not an invitee. The application was refused. The witnesses for the defence, who included their Consulting Engineer, their Harbour and Assistant Harbour Master, a foreman shipwright from Messrs. Workman & Clark, and an Assistant Manager from Messrs. Harland & Wolff, proved that they must have an area for working the dock, and that gear was spread on the cinder area completely around it ; that shores, which are owned by the defendants, and about three hundred and fifty in number, when

not in use are laid on the cinders in addition to keel blocks, keel block caps, trestles and planks, all of which had been seen between the pumping station and the dock. Other obstacles on this route consisted of mooring pawles, steps to docks, and pits for penstocks. Men from the dock, it was proved, go on both sides of the pumping station. Captain McIntyre went so far as to say that this area is never free from gear between the pumping station and the dock, such gear including shores, keel blocks and trestles, plates, angles, and other material for ships and scrap taken off ships. He further added that quite frequently men from the wharf go on the east side of the station and quite a lot of them go on the west side, which was always clear and was the recognised roadway to Clarence wharf. Magowan, Workman & Clark's foreman, with twenty-four years' experience, said he had never yet seen the area between the station and the dock without shores, and that he had himself often placed them there. The evidence of Harland & Wolff's assistant manager, who had eleven years' experience, was to the like effect. Mahood, the Deputy Harbour Master, said that on 24th November, he saw a shore in the position alleged, and that if this had been a roadway he would have moved it.

At the close of the defendants' evidence, the Attorney-General repeated his requisition for a direction, submitting that, as the plaintiff was not an invitee, the defendants owed him no duty to keep the passage between the pumping station and Thompson dock either lighted or free from obstruction, and that there was no evidence of negligence by the defendants proper to be submitted to the jury. His application was again refused.

Counsel were unable to agree upon the questions to be submitted to the jury. The Attorney-General objected to any question being left on "invitation"; but, as the question put by the learned Judge was answered in his favour, he now submits that it was properly left to them. The complete questions submitted to the jury with their answers were as follows :—

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

ANDREWS, L.J.

1. Was the plaintiff—
(*a*) invited by the defendants? *Answer:* No.
or (*b*) licensed by the defendants to use the route which he took on the 24th of November, 1930? *Answer:* Yes.
2. (*a*) Did the shore on that date constitute a dangerous obstruction on this route? *Answer:* Yes.
(*b*) If so, did the defendants know or ought the defendants to have known of such obstruction? *Answer:* Yes.
3. Were the defendants negligent—
(a) In placing or permitting to be placed the shore on the route? *Answer:* No.
(*b*) In not removing the shore from this route? *Answer:* Yes.
(*c*) In not properly lighting this route? *Answer:* Yes.
4. Was the area between the pumping station and the Thompson dock used by the defendants for the storage of—
(*a*) shores? *Answer:* Yes.
(*b*) keel blocks? *Answer:* Yes.
(*c*) other tackle? *Answer:* Yes.
5. (*a*) Was the plaintiff aware? *Answer:* Yes.
or (*b*) Should he have been aware that the area was liable to such obstruction? *Answer:* Yes.
6. If either 5 (*a*) or (*b*) is answered in the affirmative, did the plaintiff voluntarily take the risk of crossing this area? *Answer:* Yes.
7. Did the plaintiff take reasonable care for his own safety? *Answer:* Yes.
8. Damages? One hundred pounds.

The learned Judge reports that his own view was that the doctrine of *Volenti non fit injuria* did not apply, but as the Attorney-General pressed these questions upon him he thought it more prudent to get the findings of the jury upon them. The Attorney-General objected to the charge in so far as the learned Judge directed the jury that they should interpret questions 4, 5 and 6 as referring to at or about the time

at which the accident occurred ; and asked him to tell the jury that if they believed that the plaintiff had general knowledge of the liability of the area in front of the pumping station to be obstructed, they were entitled to answer questions 4, 5 and 6 in the affirmative. The Judge thereupon suggested that question 4 be altered by adding "liable to be" before "used," to which the Attorney-General assented, but Mr. Murphy would not agree. The Judge recalled the jury and told them that there was no evidence that plaintiff went to his work on that morning by the east side of the station, and that with regard to question 4 they should not confine their consideration to the 24th November but to "in or about that time," and that they were to consider whether that area was liable to be used in or about that time for storage, etc. Mr. Murphy objected to the phrase "was it liable to be used." Later the jury came out and asked was question 6 solely referable to this one shore or to shores generally, to which the learned Judge replied that it was referable to any shores or gear that would ordinarily be placed in the position that this shore was. To this direction Mr. McSparran objected on behalf of the plaintiff, submitting that the judge should have directed the jury that the risk referred to was the risk of the particular obstruction which caused the accident.

On the findings of the jury, which of course must be interpreted in the light of the directions referred to, Brown, J., gave judgment for the plaintiff. The learned Judge reports that the city special jury who tried the case and viewed the place where the accident occurred were a very intelligent one, and that they apparently took a great interest in the case. He expresses no dissent from any of their findings ; and it is therefore all the more significant that practically every answer is taken exception to in one or other of the two notices of motion to this Court.

Two main questions have to be separately considered and determined. The first is whether the findings of the jury are supported by the evidence, and the second is whether, if so supported, the judgment should in law be entered for the plaintiff or for the

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

ANDREWS, L.J.

defendants. As regards the first of these findings, Mr. Murphy, if I understood his argument aright, made three submissions; first, that the question was one for the learned Judge and not for the jury; secondly, that, if properly left to them, the jury should have held that the plaintiff was an invitee and not merely a licensee; and, thirdly, that, even accepting the jury's findings, the plaintiff was a licensee who had a common interest with the defendants, and had, therefore, on the authorities, the rights of an invitee.

As regards the first contention, I am clearly of opinion that the question of invitee or licensee is a mixed question of law and fact, and that, as such, it was competent for the learned Judge either to leave the question in the form which he did with a specific direction upon the legal aspect of the question, or to leave to them such pure questions of fact as would enable him, when they were answered, to determine whether their true legal effect was to constitute the plaintiff an invitee or a licensee. In either alternative the facts are determined by the jury and the law by the Judge. If authority be needed for the proposition that the question involves an issue which should be submitted to the jury, it is to be found in the classic judgment of Willes, J., in *Indermaur v. Dames* (1). It is the direct inference also to be drawn from *Wilson, Sons & Co., Ltd. v. Barry Railway* (2). As to the second argument, I am clearly of opinion that, whilst it would have been competent for the jury to have held otherwise on plaintiff's case, ample evidence was given by the defendants' witnesses to support the finding of the jury that plaintiff was merely a licensee. Their answer to question 4 shows that they took the view that this area between the pumping station and the Thompson dock was liable to obstruction by shores, keel blocks and other tackle. Mooring pawles, steps and pits were other obstacles more consistent with this being a working area than a roadway on which plaintiff and other workmen were invited to come. The primary use of the area was for the purpose of working at the docks. It was not laid

(1) L.R. 1 C.P. 274, 289. (2) 86 L.J. (K.B.) 432.

out as a road ; and, when one remembers the alternative unobstructed lighted route provided on the west side of the pumping station, it seems to me that the jury not only had evidence, but that the weight of evidence supported the view that plaintiff used the easterly route merely as a licensee. This brings me to Mr. Murphy's third submission that if his client was a licensee, he was not a mere licensee, but had such a common interest with the defendants that he enjoyed the rights and privileges of an invitee. There is no doubt that a licensee who is on the premises on the business of the owners or who possesses such a common interest with them is an invitee in everything but name. *Holmes v. N. E. Railway Co.*, (1), *Wright v. L. & N. W. Railway Co.* (2), *Sutcliffe v. Clients Investment Co., Ltd.* (3), and many other cases recognise this principle. But there are in my opinion several reasons why it should not be applied to the present case. It is not suggested that such a contention was ever put forward until Mr. Murphy did so in this Court ; and, accordingly, when the jury found that the plaintiff was a licensee, they obviously meant that he was a mere licensee and not one whom I have described as an invitee in everything but name. There is no finding that he was more than a mere licensee. Further, I do not think that any such finding, had there been one, would have been justified. Clearly the plaintiff was not on the quay at the time of the accident on the defendants' business ; and I am unable to see the existence of any sufficient common interest in the mere fact that the plaintiff was working for employers who were paying to the defendants harbour dues for the use of the wharf. Certainly, no common interest, if any such there was, could have existed when plaintiff, having left the check office, was returning home by the easterly route instead of by the safe roadway provided on the west side of the pumping station. The answers to questions 1 (*a*) and 1 (*b*) must therefore stand. So also must the answers to 2 (*a*) and 2 (*b*) that the shore constituted a dangerous

(1) L.R. 4 Ex. 254.
(2) 1 Q.B.D. 252.
(3) [1924] 2 K.B. 746.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

ANDREWS, L.J.

obstruction on this route of which the defendants knew or ought to have known. The answer to the question of negligence shows discrimination. A distinction was drawn by the jury between the placing of the shore on the route, as to which there was no definite evidence, and the failure to remove it from the route. Both answers, as also negligence in not properly lighting the route, are amply justified, though the legal effect of these findings in regard to a licensee remains to be considered.

We now come to what are in my opinion the most important answers in the case, Numbers 4 and 5, the joint effect of which, in the light of the learned Judge's charge, is this :—That the area between the pumping station and the Thompson dock where the accident occurred was, to the knowledge of the plaintiff, liable to be used in or about the time of the accident for the storage of shores, keel blocks, and other tackle. The jury further say that even if he was not aware of the liability to such obstruction, he ought to have been. The evidence fully warrants the findings, and it clearly establishes that the shore over which the plaintiff fell was no unusual trap. The jury also found that the plaintiff voluntarily took the risk of crossing this area. This answer seems to me necessarily to follow from the earlier findings, as the existence of the alternative safe route negatived any element of compulsion. On the facts of this case to be *sciens* was also to be *volens*.

It was argued that this answer should be set aside as being in conflict with the further finding that the plaintiff took reasonable care for his own safety, or, in other words, that he was not guilty of contributory negligence. I see no such inconsistency. They relate to a different period of time. The plaintiff voluntarily accepted the risk when he decided to cross this area ; to this extent he was in fault. But the jury apparently felt that there was no sufficient evidence upon which they could find that he was guilty of negligence in the manner in which he carried out his decision. Accordingly, whilst I have no doubt that there was evidence which, if believed, would have supported contrary findings by the jury, I am equally clearly of opinion

that there was ample and, in my view, more weighty evidence to support all the answers which they gave.

The only matter which, accordingly, remains to be determined is whether the legal effect of the findings entitles the plaintiff or the defendants to judgment. As my opinion on this point differs from that of Brown, J., I have given it much thought.

The duty owed by owners of premises to trespassers, licensees and invitees respectively has been enunciated in many reported cases from *Indermaur v. Dames* (1), to the present time. No one has thrown greater light on the subject in recent years than Lord Sumner. I briefly summarize the principles laid down in these cases as follows :—To trespassers the owner is only under a duty not to injure them wilfully or to allure them with malicious intent to injure them. Subject to this they must take the lands as they find them, and they trespass at their own risk. Licensees have a right not to be exposed to concealed traps or sources of danger. Subject to this, they also must take the premises as they find them ; and, where dangers are obvious, they run the risk of them. The general principle of law as to gifts applies. There must be something like fraud on the part of the giver before he can be made answerable. To invitees the law extends a greater measure of protection. The owners of property, whilst not under an obligation to keep their premises absolutely free from obstructions, or always to employ the best known modes of construction, must at least take all reasonable care that such premises can be used without danger, that is, that the premises shall be as little dangerous as they reasonably can be having regard to the contrivances necessarily used in carrying on the business. Thus the owner of premises will expose himself to liability towards an invitee by allowing a trapdoor through which his visitor falls unnecessarily to remain open.

In my opinion, however, there clearly emerges from all these cases one further principle, which on the unassailable findings of the jury, determines this case in favour of the defendants. As it applies to invitees

(1) L.R. 1 C.P. 274, 284-288.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

ANDREWS, L.J.

as well as to licensees, it appears to me to resolve the issue as to whether the plaintiff was on the one hand a bare licensee or on the other hand a person who was or had the rights of an invitee into a purely academic question. The principle is this, that a person who visits the premises of another cannot complain if the obstruction or danger from which he suffers injury was actually within such person's knowledge, or was obvious or reasonably to have been expected and foreseen by him. The question of the visitor's knowledge goes to the very root of the duty owed to him by the owner of the premises. I shall cite a few passages only in support of the principle. The first is from the judgment of Willes, J., in *Indermaur v. Dames* (1), where, referring to invitees, he says: "And, with "respect to such a visitor at least, we consider it "settled law that he, using reasonable care on his part "for his own safety, is entitled to expect that the "occupier shall on his part use reasonable care to "prevent damage from unusual danger, which he "knows or ought to know." The implication is clear that there is no duty to protect against a usual danger; and this is again brought out by the amended declaration sanctioned by the Court at p. 289 which contains an averment both of the defendants' knowledge and of the plaintiff's ignorance of the danger. In *Brooks v. Courtney* (2), where the plaintiff fell through an unprotected and unlighted hole in the floor of his master's premises, he was held not entitled to recover for he knew of the existence of the hole, and was, therefore, well aware of the danger. In *Mersey Docks and Harbour Board v. Procter* (3), Lord Cave, L.C., after citing the above passage from the judgment of Willes, J., and referring to the deceased man who had lost his life in Procter's case as falling within the class described by Willes, J. (*i.e.*, as an invitee), says that "he was entitled, subject to using reasonable care on "his part, to expect that the dock company should "use reasonable care to protect him from any unusual "danger known to the company and not known to or

(1) L.R. 1 C.P. 274, 288.
(2) 20 L.T. (N.S.) 440.
(3) [1923] A.C. 253, 259, 260.

"reasonably to be expected by him." This passage again clearly implies that even in the case of an invitee, there is no obligation to provide protection if the danger be not an unusual one, or one which was known to or reasonably to be expected by such invitee. Lord Sumner, treating the deceased man as a licensee, says that the occupier must not lay a trap for a licensee or expose him to a danger not obvious nor to be expected there under the circumstances; and, he continues, "If the danger is obvious, the licensee must "look out for himself; if it is one to be expected, he "must expect it, and take his own precautions. If he "will walk blindfold, he walks at his peril, even though "he is blinded by the action of the elements. . . . "The licensee is to take reasonable care of himself "and cannot call a thing a trap, the existence of "which a reasonable man would have expected or "suspected, so as to guard himself from falling into it." At page 277, referring to the deceased, he says, that he knew from his experience of the place that chains intended for the protection of pedestrians near the dockside might be down, as they in fact were; yet he walked on in the fog. On these facts, he concludes, "If knowing the risk, he elected to go on and chance "it *volenti non fit injuria*." In the opinion of the noble Lord, there was no trap because in the deceased's place a reasonable man would have known that, such as it was "the danger was one to be reckoned with." This is also the view of Lord Wrenbury, who in *Fairman v. Perpetual Investment Building Society* (1), said that by a "concealed danger" he meant a "danger that was, or ought to have been, known to the "lessor, and which the licensee, using reasonable "care, would not have discovered."

Brackley v. Midland Railway Co. (2), and other cases might be cited in support of the proposition that the duty of an invitor towards his invitee arises only in respect of dangers of which the invitee has no knowledge or notice; but further reference to the authorities is, in my opinion, unnecessary, and I merely refer in passing to the admirable summary of the cases on this

(1) [1923] A.C. 74, 97. (2) 85 L.J. (K.B.) 1596.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

ANDREWS, L.J.

branch of the law to be found in the judgment of Fitzgibbon, J., in the recent case of *Perry v. Statham, Ltd.* (1), a decision of the Supreme Court of the Irish Free State.

In my opinion the plaintiff is debarred from recovery of damages in the present case by the findings of the jury in reference to his state of knowledge of the dangers to be anticipated in the area between the pumping station and the dock, through which he chose voluntarily to walk in the dark, although another safe and well-lighted route, which was only forty yards longer, was provided for him. To him a shore such as that which he fell over was no "unusual danger," or, as Phillimore, L.J., preferred to put it in *Norman v. Great Western Railway Co.* (2), "it was not unexpected." In these circumstances, if he chose to walk in the dark he walked at his peril. Further, we are not, in my opinion, concerned with the jury's finding of negligence; for, having regard to the other findings of the jury, no such duty was owed by the defendants to the plaintiff as is implied in the question of negligence.

I should perhaps add that plaintiff's counsel, relying upon the evidence of the two witnesses, Ferris and Harris, one of whom did not see the shore when going to his work in the morning, and the other of whom said the place was then clear, endeavoured to bring the case within the line of authority in which liability has been established by reason of a superadded danger of which the plaintiff had no knowledge or notice. In my clear opinion such authority cannot apply in view of the findings of the jury in reference to the plaintiff's knowledge that this area was liable in or about the time of the accident to obstruction of this character. Having regard to this knowledge, the case is in no way different from what it would have been if the plaintiff had injured himself by walking against a crane or truck on the rails which had been in a different position when he went to his work in the morning; yet, when I put this case to Mr. McSparran during the arguments, he properly admitted that the plaintiff in such circumstances would have had no cause of action.

(1) [1929] I.R. 277. (2) [1915] 1 K.B. 584.

Judgment must be entered for the defendants with costs.

BEST, L.J.: In this case the defendants appeal against the judgment entered in the action for the plaintiff, and ask that judgment should be entered for them on the grounds set out in the notice of motion, and, alternatively, they ask for a new trial of the action on the said grounds. There is also a cross notice of motion by plaintiff for an order that the answers of the jury to the questions numbered 1 (*a*), 4 (*a*), (*b*), (*c*), 5 (*a*), (*b*) and 6, be set aside on the several grounds alleged in the cross notice, and further in respect of question No. 6 and the answer thereto, on the ground that the learned Judge at the trial should have directed the jury that there was no evidence to support an answer in the affirmative to the said question.

The action was brought by the plaintiff to recover damages for personal injuries sustained by him through the negligence and breach of duty of the defendants, their agents or servants, in and about the care, control and management of the roadways situate between the Clarence wharf and the Queen's Road, Belfast Harbour, and for damages for nuisance committed by the defendants in and about the control and management of said roadways.

The action was tried by Brown, J., and a special jury, and on the findings of the jury, the learned Judge entered judgment for the plaintiff for the sum of One hundred pounds, the amount of damages found by them.

The accident which caused plaintiff's injuries occurred on 24th November, 1930, shortly after plaintiff had ceased work at 8-30 p.m. He was in the employment of Messrs. Harland & Wolff, Ltd., on that day and had been engaged in doing work for them on the "Laganbank," a motor boat, which was being completed and which was moored at Clarence wharf. The defendants were paid by Messrs. Harland & Wolff for the use of the wharf and the accommodation provided for the ship, but were in no way brought into privity with the plaintiff.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

BEST, L.J.

At the conclusion of his work plaintiff went to the check office for the purpose of handing in his check, and having done so, he was making his way to the tramway terminus situate in Queen's Road just outside the Harbour Commissioners' property for the purpose of boarding a tram to bring him home, and it was whilst on his way there that the accident complained of occurred.

Southward of the Clarence dock and wharf, is the Alexandra graving dock and to the east of the Clarence dock and the northern end of the Alexandra dock there is a large dock called the Thompson graving dock. Situated between the Thompson dock on the one side and the Clarence and Alexandra docks on the other is a range of houses or sheds called the pumping station, and in going from the check office to the tramway terminus plaintiff proceeded between the pumping station and the Thompson graving dock, and whilst on his way he tripped over a shore about fifteen feet long and sustained the injuries complained of. Defendants say that the way by which plaintiff ought to have gone from the check office to the tramway terminus was along a well-defined, well-kept and well-lighted roadway or track on the side of the pumping station remote from the Thompson dock, and that plaintiff, in proceeding over the portion of their property situate between the pumping station and Thompson dock, did so for his own purpose, *viz.*, to save a distance of about forty yards in the journey to the tram line, and took the risk of meeting any obstruction such as a shore, keel block, or other tackle that might be encountered by a person taking that route.

Plaintiff and his witnesses gave evidence that the way taken by him on the occasion of the accident was constantly used by workmen proceeding from the tramway terminus to the Clarence dock and from the latter to the terminus. It was admitted by witnesses called for the defendants that this route was used frequently by men going to and from the Clarence dock, but these witnesses also gave evidence that this portion of defendants' property was constantly used for storing shores, keel blocks and other tackle,

and that on the other side of the pumping station there was always a clear way, and that it is the recognized roadway to the Clarence wharf.

In this case, in my opinion, there are really only two substantial points in dispute, and judgment should be entered for the side which has these points resolved in its favour :

1st.—Was plaintiff, in going by the way on which he met and tripped over the shore, an invitee of the defendants, or only a licensee ?

2nd.—Was plaintiff aware, or should he have been aware, that the area between the pumping station and the Thompson dock was liable to be obstructed by shores, keel blocks or other tackle ?

The jury have by their answers to questions 1 (*a*) and (*b*) found that the plaintiff was not invited by the defendants to use the route which he took on the 24th of November, 1930, but that he was licensed by them to do so. There is evidence both for and against the answers to these questions given by the jury, and in such a state of affairs it is not open to this Court to disturb these findings in the absence of any suggestion that the jury acted perversely, and on the assumption that it was proper to leave the questions to the jury for their finding and not to have them determined by the Judge as a matter of law. An argument was advanced to us by Mr. Murphy that the question of licensee or invitee is one of law to be decided by the Judge on the facts, which, he says, are not in dispute in this case, but this submission not having been accepted it was at Mr. Murphy's suggestion and in his own words that questions 1 (*a*) and (*b*) were put to the jury. The answers are against him and he seeks to get rid of their effect by saying that the plaintiff in this case was not a mere licensee but a licensee with an interest, and that, he contends, puts the plaintiff in the same position as if he had been invited by the defendants to use the route taken. In answer to these arguments, I say—Firstly, there is a clear finding of the jury that plaintiff was a licensee ; secondly, at the trial no such distinction as that between a licensee and a licensee with an interest was taken, and thirdly,

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

BEST, L.J.

I have come to the conclusion that between plaintiff and defendants there was no common interest by reason of the plaintiff taking the route which he did take. I have grave doubts as to whether defendants had any interest in common with the plaintiff arising from his being engaged as a workman by Harland & Wolff, but I am clearly of opinion that it could be no interest of the defendants that plaintiff by going to or from his work by the route between the pumping station and the Thompson dock saved himself a distance of about forty yards on each journey.

The plaintiff then was licensed, not invited, by defendants to take the route between the pumping station and the Thompson dock, and the question is, what was the duty of the defendants to the plaintiff in the circumstances? For answer I turn to the judgment of Lord Sumner in *The Mersey Docks and Harbour Board v. Procter* [1923] (1). At page 274 of the report Lord Sumner says: "A licensee takes "premises, which he is merely permitted to enter, "just as he finds them. The one exception to this is "that, as it is put shortly, the occupier must not lay "a trap for him or expose him to a danger not obvious "nor to be expected there under the circumstances. "If the danger is obvious, the licensee must look out "for himself: if it is one to be expected, he must expect "it and take his own precautions. If he will walk "blindfold, he walks at his peril, even though he is "blindfolded by the action of the elements."

This passage from the learned Law Lord's speech is, in my opinion, applicable to the facts of the present case. There was a great conflict of evidence as to the extent to which the part of the dock premises between the pumping station and the Thompson dock was lighted, plaintiff and his witnesses making the case that one or more of the lamps which ordinarily did light that area were not lit, whilst evidence to the contrary was given for the defendants. Admittedly the night was dark and misty, and just in proportion as the place was badly lighted, so did the peril of trying to pass over it on such a night increase, and if plaintiff

(1) [1923] A.C. 253.

walked blindfold or along an imperfectly lit place on a "pitch dark" night (the expression is plaintiff's own), he did so at his peril.

The second substantial point in dispute is whether the plaintiff was aware, or should have been aware, that the area between the pumping station and the Thompson dock was liable to be obstructed by shores, keel blocks or other tackle.

The jury have found that the area between the pumping station and the Thompson dock was liable to be used in or about this time, *i.e.*, about the day when the accident occurred, by the defendants for the storage of shores, keel blocks and other tackle, and that the plaintiff should have been aware, and was in fact aware, that the area was liable to such obstruction. In my opinion all these findings are fully supported by the evidence, and anyone with such knowledge as plaintiff is here found to have had, attempting to cross over such a place on a pitch dark night has only himself to blame for the consequences of his action.

But the jury have also found that the shore on the date in question constituted a dangerous obstruction on the route, and that the defendants knew or ought to have known of such obstruction. They also find that the defendants were not negligent in placing, or permitting to be placed, the shore on the route, but that they were negligent in not removing the shore from the route and in not properly lighting the route.

These questions should only have been submitted to the jury on proof being given that the defendants owed a duty to the plaintiff and the other workmen engaged on the "Laganbank" motor boat, to keep clear for them a route through the area between the pumping station and the Thompson dock. No such proof was forthcoming, and the defendants, in my opinion, owed no such duty. I think, therefore, that these questions and the answers to them are irrelevant to the points at issue in the action.

The seventh question, *viz.*, Did the plaintiff take reasonable care for his own safety? really means: Was the plaintiff guilty of contributory negligence? That this is its meaning is shown by Mr. Murphy's

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

BEST, L.J.

objection "P," in which he objects to the form in which question 7 is put to the jury, but respectfully asks his Lordship, Brown, J., if putting the question, to put the further question: "If so, could the defendants "by the exercise of reasonable care have avoided the "consequences of the plaintiff's want of reasonable "care?" Just as I think that questions about defendants' negligence are irrelevant to the determination of the points in dispute, having regard to the relation in which the plaintiff stood to them, so I am of opinion that there was no necessity to put question 7 to the jury.

I agree that the judgment for the plaintiff should be set aside, and that judgment should be entered for the defendants, with the costs of the action and of this motion.

MEGAW, J.

MEGAW, J.: I concur in the judgment already expressed by the learned Lords Justices.

It is not necessary for me to restate the facts but I think it is right that I should state briefly my reasons for coming to the conclusion that the judgment entered for the plaintiff should be set aside.

It seems to me that some confusion, which probably affected the mind of the jury, has arisen from the treatment of the unfenced space between the pumping station and the Thompson graving dock under different descriptions in the different questions put to the jury.

This space is dealt with in Questions 1 (*b*) 2 (*a*), 3 (*a*), (*b*), (*c*), as a route, and in Questions 4 and 5 as an area.

The attention of the jury in answering the first set of questions was thus focussed on the user of the space as a route while in answering the second set they considered its user as an area. I have no hesitation in regarding the description in Questions 4 and 5 as the more accurate, and the use of the word "route," to my mind in Question 3 was apt to mislead, as it suggested something in the nature of a defined track over which workmen would ordinarily proceed to or return from their work. Clearly there was no definite route

or way and counsel for the plaintiff in the argument did not attempt to segregate any part of the space as being particularly dedicated or marked out as a way. It follows that so far as the answers to Questions 1, 2 and 3 are concerned the same answer would have been given had the accident occurred on any part of the area between the pumping station and the Thompson graving dock other than where it actually did happen. Each and every part of the area was open to workmen in the same manner as the particular route followed on the November evening by the plaintiff.

However that may be it is established by the evidence that the primary use of this space between the pumping station and the Thompson graving dock was connected with the work done on the dock and that it formed part of what may be termed a workshop for the fitting out and repair of sea-going vessels. On this space as indeed was essential to its use, plant and tackle incident to the work I have referred to were kept to the knowledge of every one ordinarily resorting to the docks, including the plaintiff, and I agree that in determining the standard of duty owed by the defendants the knowledge of the plaintiff may be an important element. Shores such as caused the injury to the plaintiff constituted a normal part of the plant and tackle. They are somewhat cumbersome, and their removal from time to time during the progress of the work in the dock would be attended with trouble and expense. In a space devoted to ship repair the presence of these might be reasonably anticipated by a reasonable man. If placed on an ordinary way they would be an obstruction and the placing of them there would, no doubt, justify such a conclusion as the jury arrived at when they found that the particular shore over which the plaintiff fell constituted a dangerous obstruction on such way. If all this space or area were a route or way every shore placed on it would equally cause a dangerous obstruction, and the findings of the jury in their answers to Questions 3 (*b*) and 3 (*c*) might be upheld.

C.A. 1932.

GILMOUR v. BELFAST HARBOUR COMMISSIONERS.

MEGAW, J.

In my opinion, however, when one considers the real character of the space of ground between the pumping station and the graving dock very different conditions apply. The jury's answers to Questions 4 and 5 are properly directed to this use of the area.

It is elementary law that an action for negligence is based on the breach of a duty to exercise reasonable care in the circumstances of a particular case. Duty and negligence are co-related. Different standards of care are required to be exercised towards persons in different categories. The law as to the standard of care to be exercised by owners or occupiers of property to trespassers, licensees and invitees has been the subject of much learned judicial investigation. We have had many cases cited in the argument. For my own part I do not think that all the cases in the Law Reports can be reconciled. The principles applicable to cases falling in different categories are well settled though there is an undoubted difficulty in ascertaining the side of the border line between the categories on which a particular case should be placed.

In the present case we are relieved from this difficulty by the finding of the jury that the plaintiff was in the position of a licensee. I agree with the learned Lords Justices that this finding was thoroughly supported by the evidence, and that when effect is given to this considered finding, the fate of the action is determined.

Even if the finding had been otherwise and the plaintiff had been held to be an invitee I should have found it impossible to hold, in the face of the answers to Questions 4, 5 and 6, that the answers given to 3 (*b*) and 3 (*c*) would entitle the plaintiff to judgment. Since the argument an important case that has some bearing on the present was decided in the English Court of Appeal. *Hall v. Brooklands Auto-Racing Club* (1). In it this question of invitee became of vital import. Lord Justice Scrutton in his judgment referred to Lord Justice Buckley's judgment in *Norman v. Great Western Railway Co.* (2), which was cited by the learned Attorney-General. In this judgment Buckley,

(1) 147 L.T. (N.S.) 404, 407. (2) [1915] 1 K.B. 584.

L.J., said that "the duty of the invitor towards the "invitee is to use reasonable care to prevent damage "from unusual danger which he knows or ought to "know." Lord Justice Scrutton says that to this "there must be added a term that there is no obligation "to protect against a danger incident to the enter- "tainment which any reasonable spectator foresees "and of which he took the risk." This brings in the answer to the sixth question, which Lord Justice Andrews has discussed so fully and his conclusions thereon are once again supported by the English Court of Appeal. The knowledge of a risk by the plaintiff as well as of the defendant, especially when the defendant knows that the plaintiff also has knowledge of the risk is an important factor in determining what is reasonable care in any given circumstances.

As matters stand I am of opinion that the answers to Questions 3 (*b*) and 3 (*c*) put in the form that they were, could only become relevant if it were shown that the defendants were under an obligation to maintain the space between the pumping station and the graving dock as a way and keep such way free from obstruction and lighted. How they could carry on their statutory functions in regard to providing proper harbour facilities for the reception and repairing of ships in such circumstances without undue expense and embarrassment it is hard to see. The use of the graving dock requires that shores and other tackle should be readily available and I do not see any evidence in the case that would lead me to the inference that the defendants were under such duties as to removing shores and lighting this working area which the findings of the jury on Questions 3 (*b*) and 3 (*c*) presuppose. Though, as I have said, I think the answers to these questions would only be relevant in case that the defendants had some obligation more stringent than that required to licensees or invitees, such as might fall on a highway authority, I am prepared to hold that these findings are unsupported by evidence and should be set aside.

Solicitor for the plaintiff: *J. C. W. Rea.*
Solicitor for the defendants: *Robert Wallace.*

J. McC.

Ch.D. 1933.

IN RE HARDY, NELSON v. ATTORNEY GENERAL (1).

March 9.

Charity—Will—Gift in Perpetuity—Particular Charity—Lapse—Cy-près—Resulting Trust.

The testatrix having during her lifetime erected a school-house, vested, by her will, the said school-house in her trustees upon certain charitable trusts. By her will she also created a perpetual yearly rent charge which she vested in the said trustees to be expended in the maintenance of the said school and in paying a scripture reader residing on the said school premises.

The testatrix died on 1st December, 1888, and the trusts were fully carried out until by the operation of the Education Act (Northern Ireland), 1923, the school, as such, was closed permanently in February, 1929.

On a summons being brought to determine whether the said school premises and the said rent charge were still impressed with a charitable trust.

Held, by Megaw, J., following the decision in *In re Peel's Release* (2), that although the trust was for a specific charitable purpose and disclosed no general charitable intention, there was no resulting trust to the testatrix's estate, and the trust should be administered *cy-près*.

SUMMONS.

By her will, dated 10th July, 1888, Isabella Hardy devised and bequeathed a perpetual yearly rent charge of £100 to the trustees of her said will, Henry Davison and Robert Cuming, payable out of certain of her lands. The testatrix further devised by her said will to the said trustees certain premises in the townland of Banbrook upon portion of which she had built a school-house upon trust to permit and suffer the person who for the time being should be acting in the capacity of rector of the church of St. Mark, to use and employ the said premises in any way which should be proper and necessary for the furtherance of the objects and trusts declared by the testatrix concerning the said rent charge of £100. The testatrix declared the trusts concerning this rent charge in the following terms: "And I

(1) In the Chancery Division before Megaw, J.
(2) [1921] 2 Ch. 218.

"hereby declare that the said perpetual yearly rent "charge of £100 hereinbefore limited to the said Henry "Davison and Robert Cuming shall be held by them "their heirs and assigns upon the trusts following, "that is to say upon trust that the said Henry Davison "and Robert Cuming and the survivor of them and the "heirs of such survivor their or his assigns shall out "of the said rent charge pay the head rent, taxes, "insurance premiums and any expenses for proper "and necessary repairs or other due maintenance of "the said premises at Banbrook aforesaid as occasion "shall from time to time require and shall from time "to time pay over the balance of the said rent charge "and of each half yearly payment thereof to the person "who for the time being shall be acting in the capacity "or filling the position of rector of the church of St. "Mark in the City of Armagh to be by him applied and "I direct that he shall apply the same in or towards "maintaining and supporting the said school at "Banbrook aforesaid and educating boys and girls "therein and imparting to them suitable instruction "to fit and enable them for earning a livelihood but in "which school the authorised version of the Holy "Scriptures without note or comment shall form and "be the basis and the primary and most essential part "of the instructions and teaching to be given therein "and the same without restriction or limitation and "also in or towards the support and maintenance of "any scripture reader who may reside upon the said "school premises or any part thereof in applying the "said moneys as aforesaid the person aforesaid shall "have absolute discretion as to the proportion in "which he shall distribute same amongst the objects of "the trusts provided always that he shall not in any one "year apply a larger sum than the sum of £55 towards "the maintenance of such scripture reader nor shall "he be bound to apply any part of the said moneys "towards such maintenance but may if he choose "apply the whole to the other objects of the trusts "but so that nevertheless the trustees for the time "being of the said perpetual rent charge of £100 shall "have power to settle and arrange at their discretion

Ch.D. 1933.

IN RE HARDY, NELSON v. ATTORNEY-GENERAL.

"any scheme or schemes from time to time as to the "mode or manner of applying the said moneys for the "purposes aforesaid. And I hereby declare that the "said premises at Banbrook are hereinbefore devised "upon trust to permit the person acting in the capacity "or filling the position aforesaid to use and employ the "same in any way which shall be proper and necessary "for the furtherance of the objects and trusts which I "have hereinbefore declared of and concerning the "said rent charge of £100.

"If in the opinion of the person for the time being "acting in the capacity or filling the position aforesaid "it shall at any time be found that the school and "scripture reader hereinbefore directed to be main-"tained are no longer required or if the trusts herein-"before declared as to such school and scripture "reader are not carried out to the reasonable satis-"faction of the person who for the time being shall be "owner for life or for any larger estate of the real "property settled by this my will on my daughter "Mrs. Shaw and her family under the trusts and "limitations thereof then I direct that the trustees for "the time being of the said premises of Banbrook and "the said rent charge of £100 shall hold the said "premises and the said rent charge discharged from "the trusts hereinbefore declared and upon the same "trusts and with, and subject, to the same uses, powers, "provisoes and limitations as are by this my will "declared of and concerning the principal real property "settled on my said daughter Mrs. Shaw and her "family."

This real property was settled in strict settlement by Mrs. Hardy's will. Such property of the testatrix as had not been included in this settlement or otherwise disposed of by her will was given under a residuary clause to the trustees of the will in trust for Mrs. Shaw for life with remainder to her children as she might appoint. The trustees of the will accepted the trusts and they were fully carried out both as to the scripture reader and the school till the new system of education under the Education Act (Northern Ireland), 1923,

was introduced. The result of this was that the school as such ceased to exist.

Two of the questions in the summons were: (*a*) Whether the rent charge of £100 and the school premises were impressed with a charitable trust and should be administered *cy-près*. (*b*) If not so impressed, did the rent charge (or part of it) and the premises or either of them devolve as residue or sink into the settled estate.

MacDermott for the plaintiffs.

Black, K.C., for the defendant, Robert Jemmett Shaw-Hamilton.

The gift of the £100 rent charge was for the purpose of endowing a specified school and a scripture reader who was to have a definite connection with that school. The wording of the will precludes any suggestion of the existence of a general charitable intention [*In re Wilson* (1)]. On failure of the purposes for which a rent charge is created it sinks into the property out of which it is made payable [*Tucker v. Kayess* (2)].

Accordingly, the direction in the present will that on failure of the charitable purposes the rent charge is to be held upon the trusts of the settled estate is a direction that it is to go as the law would otherwise carry it. Such a direction is valid and effective and does not offend the rule against perpetuities [*In re Randell* (3) : *In re Blunt's Trusts* (4)].

In re Bowen (5), is clearly distinguishable. In that case the schools were still in existence. Accordingly the attempted gift over to an individual while the charity was still subsisting clearly transgressed the rule against perpetuities and the property still remained with the charity. There was no question of having to resort to a *cy-près* application of the funds.

In re Peel's Release (6), is an unwarranted extension of the doctrine of *cy-près* and should not be followed in this Court.

(1) [1913] 1 Ch. 314.
(2) 4 K. & J. 339.
(3) 38 Ch. D. 213.
(4) [1904] 2 Ch. 767.
(5) [1893] 2 Ch. 491.
(6) [1921] 2 Ch. 218.

Ch.D. 1933.

IN RE HARDY, NELSON v. ATTORNEY-GENERAL.

If the principle supposed to be established by that case had been good law it would have rendered unnecessary many of the discussions in reported cases as to whether testamentary gifts evinced a general charitable intention and its result would be that a testator's property could be treated as applicable for charitable purposes generally even though he had by his will clearly negatived any such application.

Chambers for the defendant, Robert Cope Hardy Shaw-Hamilton. The rent charge of £100 and the school premises, on failure of the particular charitable object, go as residue under the will.

The rent charge and the premises were treated as one entity by the testatrix in her will and no distinction should be made between them.

Nicholson for the trustees of the will of the residuary legatee.

Dougherty for the Attorney-General.

A general charitable intention might be found in the provisions of the will.

Where there is a gift to charity in perpetuity it must for all time be regarded as charitable money and be administered *cy-près* upon failure of the particular charitable purpose. In *In re Peel's Release* (1), where there was a gift of land to trustees upon trust "to "permit and suffer the same to be for ever thereafter "used as a place of instruction for seventy poor "children," with a proviso that if the charitable purposes thereby intended to be established should not take effect, or having taken effect, should afterwards cease or be defeated, the property should be held in trust for the donor, his heirs and assigns. Sargant, J., held that this proviso (which it was admitted, was void for remoteness) was evidence that the donor had no general intention of charity, but held, nevertheless, that on failure of the object there was no reverter to or resulting trust for the donor, since the donor had parted with his whole interest to the charity.

(1) [1921] 2 Ch. 218.

Your Lordship is bound by *In re Peel's Release* (1). It has never been questioned and was approved of by Andrews, L.J., in *Attorney-General v. Forde* (2).

Cur adv. vult.

MEGAW, J. : The questions involved in this summons are concerned with the trusts affecting an annuity of £100 created by the will of Mrs. Isabella Hardy and certain school premises also devised by her will. One of the plaintiffs is a present trustee of the annuity while the other is a person designated by the will to carry out the trusts with which the summons is concerned. The following clause in the will raises a difficult point in regard to the gift connected with the school [His Lordship read the provision creating the trust, and continued :—] This real property was settled in strict settlement by Mrs. Hardy's will. Such property of the testatrix as had not been included in this settlement or otherwise disposed of by her will was given under a residuary clause to the trustees of the will in trust for Mrs. Shaw for life with remainder to her children as she might appoint. The trustees of the will accepted the trusts and they were fully carried out both as to the scripture reader and the school till the new system of education under the Education Act (Northern Ireland), 1923, was introduced. The effect of this has been that the school has ceased to exist as such but the plaintiff, Canon Moeran, has still used part of the £100 rent charge in paying a scripture reader. The balance of income has been accumulated.

Canon Moeran has stated in his affidavit that in his opinion the school is no longer required for a day school and he sees no likelihood of its being required in the future, following the terms of the will as to the circumstances in which an intended gift over may become effectual.

The question therefore has to be decided whether in the circumstances there should be a *cy-près* application of the rent charge and the school premises.

If this were decided in the negative a nice question would arise as to whether the charge and the school

(1) [1921] 2 Ch. 218. (2) [1932] N.I. 1.

Ch.D. 1933.

IN RE HARDY, NELSON v. ATTORNEY-GENERAL.

MEGAW, J.

premises, or one of them, should go to the persons entitled under the settlement or should go as residue under Mrs. Hardy's will.

For some purposes in coming to a conclusion as to whether there should be a *cy-près* application of charitable funds it becomes a vital question whether there is a trust for charities generally created, or whether the donor of the property had the intention only of benefitting a particular object. It seems strange when one considers the principles of the doctrine of *cy-près* to find that it is ever applicable where only a particular charity has been mentioned, or contemplated, in the instrument creating the trust. Apart from authority I should have required a strong argument to convince me of the jurisdiction of a Court of Equity to do so. I should have thought that the very essence of *cy-près* was to carry out in a practical form the intention of the person creating a trust where, and only where, a general intention to benefit charities could be gathered from the instrument though a particular method of applying the trust fund had been specified and this method so contemplated by the creator of trust had become impracticable.

In the present case I have come to the conclusion that the trust created by the will was not for charitable purposes generally. The objects of the trust are defined by the testatrix with reasonable certainty. There may be some possible ambiguity as to the position of the scripture reader in regard to the school, but *primâ facie* I should be disposed to the view that the benefit intended for the scripture reader was given in relation to, and ancillary to, the educational work of the school.

After consideration I have come to the conclusion that there is judicial authority binding on me in deciding this crucial question. The cases cited were generally concerned with some such situation as has arisen here, viz., circumstances arising from legislation in regard to education.

I cannot, unless by resorting to hair-splitting, distinguish the main features of this case from those

dealt with in *In re Bowen* (1), and in *In re Peel's Release* (2).

Re Monk (3), referred to by my predecessor, Wilson, J., in *Attorney General v. Forde* (4), is not really much in point, as Lord Hanworth and the other Lord Justices found that in that case there was a general charitable intention, and I should think that the decision of the English Court of Appeal was given on the same assumption.

Neither do I think that *In re Slevin* (5), also a decision of the English Court of Appeal, governs the present case seeing that while it was a particular object that was named as beneficiary there was no suggestion of a gift over, and the legacy was a simple pecuniary legacy. While Wilson, J.'s, judgment dissents so strongly from Lord Hanworth's reasoning in *In re Monk* (3), his decision as affirmed by the Court of Appeal really turned on the consideration that the gift in its origin was not charitable. But as Andrews, L.J.—though in the circumstances his judgment as to this is an *obiter dictum*—approved in clear terms of *In re Peel's Release* (2), I feel that I am not at liberty as a court of first instance to do otherwise than follow that authority, though I feel that in deciding as I do I am not carrying out the intention of the testatrix.

My answers to the questions in the summons affecting the rent charge of £100 and the school premises must be given on that basis.

Solicitor for the plaintiffs: *W. T. Bradley.*

Solicitors for the defendant Robert Jemmett Shaw-Hamilton: *G. L. McLaine & Co.*

Solicitors for the defendant Robert Cope Hardy Shaw-Hamilton: *R. H. Orr & Sons.*

Solicitor for the trustees of the will of the residuary legatee: *Stanley Haggan.*

Solicitor for the Attorney-General: *Hume Babington.*

J. R.

(1) [1893] 2 Ch. 491.
(2) [1921] 2 Ch. 218.
(3) [1927] 2 Ch. 197.
(4) [1932] N.I. 1.
(5) [1891] 2 Ch. 236.

C.A.
1932.

June 20.

ALEXANDER v. ANDERSON (1).

(1931. No. 3000.)

Negligence—Direction—Onus Probandi—Judgment for defendant at close of plaintiff's case—Plaintiff's evidence requiring explanation by defendant—New trial.

Where a cyclist had been killed in a collision between two motor cycles, no witness was produced who had actually seen the accident, but the damaged bicycles, on which the deceased and the defendant were respectively riding, were found after the accident interlocked, close up against a stone wall on what was the deceased's proper side of the road, and the defendant was lying ten feet from his machine, on the same side of the road, while it was proved, as a reason for the defendant riding on his wrong side of the road, that the surface on his proper side was very rough, whilst that on the stone wall side was much better. At the conclusion of the plaintiff's case an application was made for a direction on behalf of the defendant on the ground that there was no evidence fit to go to the jury that the defendant had been guilty of any negligence.

The Judge granted the application.

Held, by the Court of Appeal [Andrews and Best, L.JJ. (dissentiente, Moore, L.C.J.)] that the plaintiff had established a sufficient *primâ facie* case, that she was entitled on the evidence to have her case submitted to a jury, and that the motion instituted by her for a new trial should be granted.

Held, by Moore, L.C.J., that the plaintiff had failed to discharge the burden of proof which was placed upon her, and that the Judge was right in withdrawing the case from the jury.

MOTION for a new trial.

The action was brought by the plaintiff, Agnes Alexander, as sole surviving parent of James Alexander, deceased, claiming damages for loss sustained by her by reason of the defendant's negligence in the control and management of a motor cycle on the public road at Roughfort, County Antrim, on July 3rd, 1931, when her son, James Alexander, was killed.

The action was tried before Brown, J., and a common jury of the City of Belfast, on 19th April, 1932. No

(1) In the Court of Appeal before Moore, L.C.J., Andrews, and Best, L.JJ.

witness was produced on behalf of the plaintiff who had actually seen the accident. Evidence was, however, given on behalf of the plaintiff that after the accident the defendant was found in a sitting position struggling to get up. The deceased was lying on top of his bicycle with his forehead lightly on wall, his legs astride the machine. The front wheel of the defendant's bicycle was on top of the front wheel of the deceased's bicycle. The plaintiff seemed to have been jammed against the wall. Both machines were practically against the wall. The side of the road next the gate was very low and the surface very rough. The side next the stone wall was much smoother and more level. The bicycles were interlocked. The defendant was ten feet from his machine on the wall side of the road. It was on the left side of the road that the two bicycles were found, that is, on the deceased's proper side of the road.

At the close of the plaintiff's case, Beattie, K.C., for the defendant, asked for a direction on the ground that there was no evidence, fit to go to the jury, of any negligence on the part of the defendant.

The Judge granted the application for a direction, stating that it was his opinion that the collision was entirely unexplained and that the fact that the bicycles were found on the defendant's wrong side of the road was not any evidence of where defendant had been riding before the accident.

The plaintiff applied to the Court of Appeal for an order that the verdict and judgment directed for the defendant be set aside and that a new trial be ordered on the grounds that there was evidence in support of the plaintiff's claim proper to be left to the jury, and that the Judge was wrong in withdrawing the case from the jury and directing judgment for the defendant.

The Attorney-General (*A. B. Babington, K.C.*) and *Murphy, K.C.* (with them, *G. B. Hanna*), in support of the motion :—

We submit that all the circumstances point to the accident having taken place on the deceased's proper

C.A. 1932.

ALEXANDER v. ANDERSON.

side of the road. The accident happened through the negligence of the defendant who must have come round the corner on his wrong side of the road. If a verdict had been found for the plaintiff no court would have set it aside. In the absence of any explanation the plaintiff has established a *primâ facie* case.

It is clear that one or other of these parties was to blame. The plaintiff's case is not based on mere speculation. We contend that the deceased met his death while on his right side of the road. The strength of plaintiff's case is based on the position of the motor cycles after the accident. The plaintiff had a perfectly good case to go to the jury. The defendant should have been called upon to give some evidence as to how he came to be on his wrong side of the road.

In *Chaplin v. Hawes* (1), it was held that though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it.

In *Pluckwell v. Wilson* (2), it was held that a person driving a carriage is not bound to keep on the regular side of the road ; but, if he does not, he must use more care, and keep a better look-out, to avoid concussion, than would be necessary if he were on the proper part of the road.

In his speech in the House of Lords in *Wakelin v. London and South-Western Railway Co.* (3), Lord Watson said :—"I am of opinion that the onus of "proving affirmatively that there was contributory "negligence on the part of the person injured rests, in "the first instance, upon the defendants, and that "in the absence of evidence tending to that conclusion, "the plaintiff is not bound to prove the negative in "order to entitle her to a verdict in her favour."

In *Flannery v. The Waterford and Limerick Railway Company* (4), it was held that where the plaintiff

(1) 3 C. & P. 554.
(2) 5 C. & P. 375.
(3) 12 A.C. 41, 47.
(4) I.R. 11 C.L. 30.

sustained injuries in consequence of a portion of the train in which she was travelling having left the rails, and the railway, the engine and the carriages were under the defendants' management, the fact of the accident was sufficient evidence to cast upon the defendants the burden of showing that there was no negligence on their part ; and that as they declined to afford any explanation of the cause of the accident, there was a case for the plaintiff proper to be submitted to the jury. We rely on the words used in that case by Palles, C.B., at pages 36-37 of the report.

If the rule laid down by Palles, C.B., be applied, it can be inferred that the accident occurred on the deceased's proper side of the road. Palles, C.B.'s, judgment contains a general statement of the law which has been frequently followed.

Halliwell v. Venables (1), was a case where a widow, whose husband had been killed in a motor accident, brought an action for damages against the driver of the motor car in which her husband was riding when he was killed. At the close of the plaintiff's case, the trial judge, partly at the invitation of the defendant's counsel, held that there was no case to go to the jury and gave judgment for the defendant. On appeal by the plaintiff, the Court of Appeal, applying a dictum of Erle, C.J., in *Scott v. London and St. Katherine Docks Co.* (2), held that the facts proved required explanation by the driver of the motor car, as they constituted an accident of a kind which would not usually happen with proper driving, and therefore the case ought not to have been withdrawn from the jury. There must, therefore, be a new trial.

In *Ellor v. Selfridge & Co., Ltd.* (3), it was held that where a motor van gets on to a pavement intended for foot-passengers and injures persons standing there, these facts, in the absence of explanation, constitute evidence of negligence. We rely on the judgment of Scrutton, L.J., in that case. Romer, L.J., said in that case that "if a man used a footpath he risked a "collision with another person using the footpath, or

(1) 99 L.J. (K.B.) 353.
(2) 34 L.J. (Ex.), 220, 222.
(3) 46 T.L.R. 236.

C.A. 1932.

ALEXANDER v. ANDERSON.

"possibly with a perambulator. But a motor van "had no right to make use of that particular part of "the highway. The defendants here had called no "evidence, and it was essential for them to show how "their motor van got on to the pavement." We submit that there is no difference in principle between a case dealing with an accident on the pavement and one dealing with an accident on the wrong side of the road.

In *Craig v. Glasgow Corporation* (1), the pursuer was driving two cows carefully along a road on a winter evening. The road was imperfectly lighted, but it was possible to see a fair distance. A tramcar belonging to the defenders was being driven along the road. The driver did not see the man with the cows, and if he had seen them he would have been driving more slowly. The first thing that the driver saw was the head and shoulders of a cow close to the car. He put on his brake but the car hit and grazed the cow, and before the car stopped, about three yards further on, the driver felt a bump. The driver then got down and found the pursuer unconscious on the near side of the car.

In an action for personal injuries the pursuer alleged that he had been knocked down by the car owing to the negligence of the driver in not keeping a good look-out, and was therefore rendered insensible and suffered from concussion, in consequence of which he had no recollection of the circumstances immediately preceding the accident.

The defenders did not dispute the alleged negligence, but they contended that the pursuer had failed to prove that the car struck him at all or that if it did that this was due to the alleged negligence. There was no evidence by any person who actually saw the accident, but the judge at the trial found that the true inference was that the pursuer was knocked down by the car owing to the driver's not keeping a proper look-out, and he awarded the pursuer damages.

It was held that the facts supported the judge's inference and the pursuer was entitled to recover.

(1) 35 T.L.R. 214.

We submit that the legitimate inference to be drawn in the present case is that this accident occurred by reason of the defendant being on his wrong side of the road.

We submit that upon the cases, once there is a state of facts which is capable of reasonably explaining the accident, the plaintiff is entitled to have the case left to the jury, even though there may be evidence showing that some other inference might have been drawn.

We rely on the proposition stated by Scrutton, L.J., in *Halliwell v. Venables* (1), when he said that following *Scott v. London and St. Katherine Docks Co.* (2), in the case of *Ellor v. Selfridge & Co.* (3), the Court of Appeal held that, as motor cars do not usually run on to the pavement and hit people in the back, the fact that a motor car did run on to the pavement and the man who was driving it gave no explanation with regard to why it ran on to the pavement was in itself evidence of negligence in the absence of explanation, to entitle the plaintiff to have the case left to the jury.

All that the plaintiff has to show is that the legitimate or natural inference is that the accident occurred while the defendant was on his wrong side of the road.

The absence of tracks entirely corroborates the view presented on behalf of the plaintiff. The track on the deceased's proper side of the road was in better condition than that on the other side of the road. That is a fact which the jury would have been entitled to take into consideration.

In *Fleet v. Johnson & Sons* (4), a mason's labourer, using a hammer and chisel at his work, left home without any injury to his hand. He returned home with an abrasion on the thumb of the hand that held the chisel where the hammer would most probably have hit him had it slipped. The thumb was poulticed and about a fortnight later, after it had apparently healed, an abscess formed in the armpit and the man died soon after from blood poisoning due to the abscess. There was medical evidence that the incubation period

(1) 99 L.J. (K.B.) 353.
(2) 34 L.J. (Ex.) 220.
(3) 46 T.L.R. 236.
(4) 6 B.W.C.C. 60.

C.A. 1932.

ALEXANDER v. ANDERSON.

was consistent with the view that a microbe had entered the wound in the thumb on the day of the injury and set up the abscess. There was no evidence to support any other theory. The County Court Judge found that there had been an accident arising out of and in the course of the employment and that death resulted from the injury caused thereby.

It was held that there was evidence to support the finding.

We submit that Brown, J., was wrong in not submitting the case to the jury.

[They also referred to *Walton & Co. v. The Vanguard Motor Bus Co., Ltd.* (1), and *Cooper v. The General Accident Assurance Corporation* (2).]

Beattie, K.C. and *Lowry, K.C.* (with them *J. D. Chambers*) for the defendant :—

Wakelin v. London and South-Western Railway Co. (3), was a case where a railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night.

The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line.

An action on the ground of negligence was brought by the administratrix of the deceased, and the jury found a verdict for the plaintiff.

It was held by the House of Lords, affirming the decision of the Court of Appeal, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident ; that there was therefore no case to go to the jury and that the railway company were not liable.

(1) 25 T.L.R. 13.
(2) [1922] 2 I.R. 38.
(3) 12 A.C. 41.

We rely on the words used by Lord Halsbury in his speech in that case at pages 44 and 45 of the report, and on the words used by Lord Watson at page 49.

Before a defendant is called upon to give evidence a case must have been made against him. In the present case, the evidence goes to show that there was no head-on collision.

It is impossible to establish conclusively the exact spot where the accident took place. If either of two conclusions can be arrived at with equal reason, the plaintiff cannot succeed.

The position in which the defendant and his bicycle were found should have no weight whatever. No jury should be left to surmise as to the cause of the accident.

In *Langham v. Governors of Wellingborough School and Fryer* (1), Greer, L.J., said in his judgment :—" If " in the ordinary course, the odds, if I may use the " expression, in the inferences that may be drawn from " the facts proved, are decidedly in favour of negligence " on the part of the defendant as the explanation of " what occurred, then there is sufficient evidence ; " but if it is, in the ordinary course, just as likely that " the event happened without negligence as it is that " it happened with, and in consequence of negligence, " then there is no evidence to go to the jury, and the " defendant is not called upon to run the risk by his " answer, or possibly by some slip on the part of a " careless witness, of providing evidence which the " plaintiff has himself been unable to find."

There is no evidence as to how this accident happened. The proper rule of law was laid down in *Cotton v. Wood* (2), by Erle, L.J., when he said :—" To warrant a case " being left to the jury, it is not enough that there may " be some evidence of negligence ; a mere scintilla of " evidence is not sufficient ; but there must be proof " of well-defined negligence."

We rely on the words used by Palles, C.B., in his judgment in *Flannery v. The Waterford and Limerick Railway Company* (3), when he said :—" To say that " each of two inferences—the one sufficient, and the

(1) 101 L.J. (K.B.) 513, 518.
(2) 29 L.J. (C.P.) 333, 335.
(3) I.R. 11 C.L. 30, 37.

C.A. 1932.

ALEXANDER v. ANDERSON.

"other insufficient, to support the case—is equally "consistent with the facts proved, is but another "mode of saying that the inference in support of the "plaintiff's case cannot reasonably be drawn. In that "event the plaintiff, who requires preponderating "evidence must fail."

This is not a case where the principle of "*res ipsa "loquitur*" applies.

Halliwell v. Venables (1), and *Ellor v. Selfridge & Co.* (2), are clearly distinguishable from the present case. We rely on *Wing v. London General Omnibus Company* (3). In that case, a motor omnibus belonging to the defendants, in which the plaintiff was a passenger, "skidded" upon a road the surface of which was greasy from rain, and ran into an electric light standard, and the plaintiff was in consequence injured. There was no evidence given for the plaintiff of anything beyond the above-mentioned facts.

It was held in the Court of Appeal by Vaughan Williams, L.J., and Fletcher Moulton, L.J. (Buckley, L.J., dissenting), that there was no evidence for the jury that the defendants' allowing the motor omnibus to run under the circumstances constituted a nuisance, and that therefore the decision of the County Court Judge who had entered judgment for the defendants was right. In that case Fletcher Moulton, L.J., said :— "There was no evidence whatever that the accident was "due to negligence on the part of the servants of the "defendants who were in charge of the omnibus, "unless the mere occurrence of the accident amounts "to such evidence. In my opinion the mere occurrence "of such an accident is not in itself evidence of "negligence."

In the *Metropolitan Railway Co. v. Jackson* (4), Lord Blackburn said in his speech in the House of Lords :— "It was formerly considered necessary in all cases to "leave the question to the jury, if there was any evi- "dence, even a scintilla, in support of the case, but "it is now settled that the question for the judge "(subject of course to review) is as is stated by Maule,

(1) 99 L.J. (K.B.) 353.
(2) 46 T.L.R. 236.
(3) [1909] 2 K.B. 652, 663.
(4) 3 A.C. 193, 207.

C.A. 1932.

ALEXANDER v. ANDERSON.

" J., in *Jewell v. Parr* (1), not whether there is literally " no evidence, but whether there is none that ought " reasonably to satisfy the jury that the fact sought to " be proved is established."

The Trial Judge was absolutely right. The onus of proof has not been discharged by the plaintiff.

The Attorney-General (in reply) :—

This accident was occasioned by the negligence of the defendant. The jury would have been entitled to draw the inference that the defendant took to the wrong side of the road at the last moment. We submit that the accident is far more consistent with its being due to the negligence of the defendant than to that of the plaintiff.

Metropolitan Railway Co. v. Jackson (2), does not apply to the present case, which has not been presented as a case to which the principle of *res ipsa loquitur* applies. The onus was shifted by the evidence given on behalf of the plaintiff. The evidence given on behalf of the plaintiff establishes a great deal more than the fact that an accident took place.

Cotton v. Wood (3) was a case where the evidence was evenly balanced. *Wing v. London General Omnibus Co.* (4) is not an authority which governs the present case.

The principle laid down by Palles, C.B., in *Flannery v. The Waterford and Limerick Railway Company* (5) applies to the present case.

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J., having stated the facts, said: The question before us is, whether the learned Judge at the trial was right in withdrawing the case from the jury at the close of the plaintiff's evidence, as he has done.

In my opinion he was perfectly right. I have formed a very clear view of the situation, and feel that I would have done exactly the same myself, though of course it does not follow I must be right, my

(1) 13 C.B. 916.
(2) 3 A.C. 193.
(3) 29 L.J. (C.P.) 333.
(4) [1909] 2 K.B. 652.
(5) I.R. 11 C.L. 30, 36-37.

C.A. 1932.

ALEXANDER v. ANDERSON.

SIR WILLIAM MOORE, L.C.J.

only doubt being occasioned by the fact that unfortunately I am differing from my two brothers in Court.

I consider that the Law is correctly stated by Palles, C.B., in *Gorman v. The Hand in Hand Insurance Company* (1), when he said :—" In every case, before a " question is left to the jury there is a preliminary " question which is one of law. But what is that " question ? I answer, in the words of Willes, J. : " ' Whether there is any evidence on which the jury " ' could properly find the question for the party on " ' whom the *onus of proof lies.*' "

I would wish to point out that if this question of law arises, it must be decided by the Judge, as a question of law, and not by the jury.

In the present case the onus lay on the plaintiff, of offering so much evidence of negligence on the part of the defendant, as would throw the onus of making a reasonable explanation on to the defendant. So far as I can see, the only evidence that the plaintiff has offered in discharge of this onus has been the fact that the damaged bicycles were found locked together, on what would be the proper side of the road for plaintiff's son, the deceased, and also that the defendant himself was found ten feet behind the bicycles, on what would be his wrong side of the road.

No evidence was given, or can be given, because no eye-witnesses were present, and because there were no traces on the road as to the part on which the actual collision took place. Is the jury to be allowed to speculate on that ?

It is then argued that the position of the deceased and the bicycles, implies that the collision must necessarily have taken place on the defendant's wrong side of the road.

I decline, after a collision between two machines of this nature, when no one can tell the force of the impact, the weight of the machines, the speed at which one or other was travelling, the angle at which they collided, to draw any inference from the position in which, after the accident, the machines might be

(1) I.R. 11 C.L. 231.

found. So, too, the defendant's position might arise from being thrown off at the point of collision, or jumping off before it, or being thrown back some distance by the collision, or crawling back after the impact. In my opinion also, the jury should not be allowed to speculate upon such a result.

Further, in the present case, as the evidence goes, it is obvious that there is no proof as to whether the accident was caused at all by the negligence of either party, or by the negligence of the defendant, or by the joint negligence of the defendant and the plaintiff's son himself, or by the sole negligence of the plaintiff.

We, in this Court, with all our experience can only speculate as to what the correct answers may be to the foregoing; if we do arrive at any conclusion, it is after all only guesswork; if we cannot do more, I decline to open up a whole vista of such speculation before any jury.

I therefore think that at the close of the plaintiff's case she had failed to discharge the burden of proof which was placed upon her in law.

I further think that unless the law compels it, it is unfair to expose the defendant to the risk of a defence, and again regretting my unhappy difference with my brothers, I must hold that the learned Judge was right and that the Appeal should be dismissed.

ANDREWS, L.J.: I regret exceedingly that I cannot agree with the judgment of the Lord Chief Justice. A case such as this may be proved either by the direct evidence of an eye-witness of the accident or by inference reasonably drawn from facts which have been proved. In the present case the plaintiff was unable to produce as witness any person who had actually seen the accident happen; and the principal evidence relied upon on her behalf as establishing a *primâ facie* case of negligence was that the two damaged bicycles, on which the deceased and the defendant were respectively riding, were found after the accident interlocked close up against a stone wall on what was the deceased's proper side of the road. In addition to this, the witness James Hewitt proved that the

C.A. 1932.

ALEXANDER v. ANDERSON.

ANDREWS, L.J.

defendant was lying ten feet from his machine on this —the wall—side of the road. It was further proved, as a reason for the defendant riding, as was alleged, on his wrong side of the road, that the surface on his proper side was very rough, whilst that on the stone wall side was much better. In my opinion, this is all evidence which, though by no means conclusive, cannot be ignored. It was evidence which, if uncontradicted and unexplained, would have justified a jury in coming to the conclusion that one cause at least of the accident was that the defendant was cutting the corner on his wrong side of the road. I agree that it is not enough for the plaintiff to give merely a *scintilla* of evidence; but this is, in my opinion, something definitely more than a *scintilla*. The plaintiff has proved a fact, which, in the absence of explanation by the defendant, constitutes reasonable evidence of negligence on which a jury were entitled to act.

Now it has been argued in this case that the plaintiff must fail because her evidence was in no sense conclusive, and it would, accordingly, have been not only possible but reasonable for the jury to have drawn an inference which would have been consistent with the non-existence of any negligence on the part of the defendant. I prefer to answer this argument by adopting as my own words a passage from the judgment of Palles, C.B., in *Flannery v. W. & L. Railway Co.* (1).

"The defendants," he said, "argue from this "circumstance alone, that the case ought not to have "been left to the jury; that the existence of any "reasonable alternative in which the defendants will "not be liable is a fatal objection to the plaintiff's "case. If they are right in this, any case in which "the facts are not in dispute, but are capable of "supporting either of two separate inferences of fact, "one of which will support and the other defeat the "plaintiff's case, ought to be withdrawn from the jury. "Now, I say with deference that this is not, and never "was the law. Such, no doubt, is the law if each of "such alternative inferences is, as it is styled, *equally* "*consistent* with the facts proved. This, in my mind,

(1) I.R. 11 C.L. 30, 36-37.

"is not a very happy expression. In applying the rule "it must be borne in mind that, before it can lead to a "direction against the plaintiff, the Court must "assume that every inference of fact which a jury "might legitimately draw in favour of the plaintiff "has been drawn, and must assume the existence of "the fact so inferred, in addition to the facts proved. "It follows that the rule has no application to cases in "which a reasonable inference in favour of the plaintiff "might be drawn. If it *might* be, it *must*, for the "purposes of the direction, be assumed to have been "drawn. To say that each of two inferences—the one "sufficient, and the other insufficient, to support the "case—is equally consistent with the facts proved, is "but another mode of saying that the inference in "support of the plaintiff's case cannot reasonably be "drawn. In that event the plaintiff, who requires "preponderating evidence, must fail. It is a wholly "different proposition that the same result must follow "where, although a reasonable inference against the "plaintiff might be drawn, yet an inference the other "way would also be reasonable. In such an event "the case is for the jury, and (although some of the "propositions in decided cases upon this subject are "not as clearly expressed as might be desired) I have a "strong opinion that to impute to any Judge an in-"tention to lay down the opposite doctrine is to "misconstrue his language."

Now, applying the principles laid down by the Lord Chief Baron to the present case, I am clearly of opinion that the jury would have been entitled to find as a legitimate and natural inference, from the facts which were proved, that the accident occurred on what was the defendant's wrong side of the road, and that it was occasioned thereby. As this inference might reasonably be drawn, it must, for the purposes of a direction, be assumed to be drawn. The plaintiff established a sufficient *primâ facie* case. She was entitled on the evidence to have her case submitted to a jury, and her motion should, accordingly, in my opinion, be granted with costs.

C.A. 1932.

ALEXANDER v. ANDERSON.

BEST, L.J.

BEST, L.J. : I agree with the judgment which has been delivered by my brother Andrews, L.J. There must be a new trial.

Solicitors for the plaintiff : *George Allen & Co.*
Solicitors for the defendant : *McKinty & Wright.*

J. McC.

IN THE MATTER OF

Ch.D.
1933.

Feb. 20, 28.

THE ESTATE OF GEORGE BALL, DECEASED. COWAN AND JOHNSON v. BALL (1).

(1933. No. 15).

Will—Construction—"Heirs"—Word "heir" appearing in the form "heirs," with "s" at the end struck out, but still visible—Gift of farm of land, money, goods and chattels—Gift over on death without issue or an heir to testator's brother or his "heir."

A testator left his farm, money, goods and chattels, to his son, H. B., subject to certain legacies.

The will also contained the following clause:—"I also direct "should my son, H. B., die without issue or an heir, I allow my "said farm, money, goods and chattels to go to my brother, J. B., "or his heirs," subject to the legacies already referred to.

Where the word "heir" appeared secondly in the will, it appeared in the form "heirs" with the "s" at the end struck out but still visible, showing a correction of the form apparently originally written.

Held, by Megaw, J., following *Gann v. Gregory* 3 De G. M. & G. 777, that the word in controversy should be read as "heir" not "heirs."

Held further, following *Weldon v. Weldon* [1911] 1 I.R. 177 that the gift over did not take effect, that the 29th section of the Wills Act did not apply, and that consequently H. B. took an absolute interest.

ORIGINATING SUMMONS.

By his will, dated February 28th, 1895, George Ball left and bequeathed to his son, Hugh Ball, "my farm "of land, money, goods and chattels, which I may die "possessed of or entitled to," subject to a number of legacies which followed.

After the legacies, there was the following clause:—"I also direct should my son, Hugh Ball, die without "issue or an heir I allow my said farm, money, goods "and chattels to go to my brother, John Ball, or his "heirs," subject to the several legacies.

(1) In the Chancery Division before Megaw, J.

Ch.D. 1933.

COWAN AND JOHNSON v. BALL.

The will contained the marks of two obliterations, neither of them having been initialed or specially attested. The first was merely the striking out of the duplicate words "I leave" in the gift of a small legacy, and was of no importance. The second occurred in the clause which provided that in case the testator's son should die without issue or an heir, he (the testator) allowed his farm to go to his brother, John Ball, or his "heirs," subject to the legacies which have been already referred to.

In this clause where the word "heir" secondly occurred, it appeared in the form "heirs" with the "s" at the end struck out but still visible showing a correction of the form as it apparently originally appeared.

The testator, George Ball, died on March 25th, 1895. The farm was held by a tenure under which it had to be dealt with as personal property. Probate of the will was granted on 18th December, 1895, to the executors named in it.

Hugh Ball shortly after his father's death went into possession in due course of administration, and remained in possession till his death. He was married on July 2nd, 1923, and died on July 26th, 1932, without issue. By his will, he appointed the plaintiffs in the summons his executors and probate of the will was granted to them.

The testator's brother, John Ball, died intestate on 15th May, 1910, leaving a widow who died in 1918, and several children.

The summons was brought by the plaintiffs to decide who was entitled to the farm.

S. C. Porter, K.C., for the plaintiffs :—

There might be a very simple solution of the problem. It might be decided that Hugh Ball took an absolute interest. It might be possible to treat the word "heir" as referring to a *persona designata*.

In *Smith v. Butcher* (1), there was a bequest of personal estate to "the children of A. during their "lives, and on the decease of either of them his or her

(1) 10 Ch.D. 113.

"share of the principal to go to his or her lawful heir "or heirs."

It was held by Jessel, M.R., that "lawful heir or "heirs" must be read literally, and not as meaning "next of kin," "executors or administrators," or "children."

In *Keay v. Bolton* (1), it was held, that the word "heirs" had a two-fold meaning, viz., heir-at-law as regarded the real estate, and next-of-kin as regarded the personalty.

In that case Pearson, J., said in his judgment:— "I think Lord Cottenham would have had no difficulty "in holding that in a gift of real and personal estate "together the word 'heir' might have one meaning "as to the real estate, and another meaning as to the "personal estate—that it might mean the heir-at-law "in relation to the real estate, and the next-of-kin in "relation to the personal estate."

In *Gray v. Gray* (2), a testator left a chattel farm to his son, John, and directed that if he should die "without lawful aires" the farm should go to testator's son, Thomas, or his "airs," he paying certain sums to John's widow, and his brothers and sisters. John died without issue.

It was held that the context showed that the words "without lawful aires," meant without next-of-kin being children or descendants, and that the gift over to Thomas took effect.

In *Walker v. Cusin* (3), a testator bequeathed to his wife the income of all his property during her lifetime, and directed everything to be sold at her death, and the proceeds to be equally divided, one-half among his wife's and one-half among his own relations. These various relations were all named. All these named relations survived the testator, but three of them died during the lifetime of the testator's wife. It was held that in all these gifts the word "heirs" meant such persons as would be entitled to succeed to personal property *ab intestato.*

(1) 25 Ch.D. 212.
(2) [1915] 1 I.R. 261.
(3) [1917] 1 I.R. 63.

Ch.D. 1933.

COWAN AND JOHNSON v. BALL.

M. G. Ellison for the defendant, George Ball :—

The land is registered and devolves as personalty.

In *Williams on Executors* (11th edition) 1st volume, p. 234, it is stated " where alterations are satisfactorily " shown to have been made before the execution, it is " usual to engross the probate copy of the will *fair*, in- " serting the words interlined in their proper places, and " omitting words struck through or obliterated. But " in cases where the construction of the will may be " affected by the appearance of the original paper, " the Court will order the probate to pass in *fac simile*. " And it appears to have been sometimes supposed " that the grant of such a probate leaves it open to a " Court of Construction to inquire whether such " alterations of the will were made under such circum- " stances as to be effectual. But it is plain, it would " seem, that unless the Court of Probate had adjudged " that the obliterations or other alterations had been " effectually made, the decree would have been for " probate of the will in its original state. A *fac simile* " probate, therefore, of a will made after the Wills Act " came into operation is conclusive in the Courts, that " the will was in that state before its execution, *i.e.*, " that the testator duly executed it with the alterations " or cancellations upon it. And the object of the " *fac simile* is that the alteration, etc., may possibly " help to show the meaning of the testator."

In *Gann v. Gregory* (1), the Lord Chancellor, Lord Cranworth, said the principle that *primâ facie* the presumption of law is, that alterations and erasures in a will are made after the execution does not apply to a case where the probate has been granted with the alterations on it.

I submit that the word " heir " should be interpreted as referring to a *persona designata*. The testator's intention was that the property should go to one particular person.

In *Danvers v. Earl of Clarendon* (2), goods were devised to A. for life, and after the death of A. to the heir of B. B. died in the lifetime of A. It was

(1) 3 De G.M. & G. 777, 780 (2) 1 Vern. 35.

decreed that the goods should go to him that was heir of B. at his death, and not to him who was his heir at the death of A.

In *Southgate v. Clinch* (1), a testator bequeathed a sum of £2,000 Consols to be divided between his children when each of them attained the age of twenty-one years, but should neither of them attain that age, then he bequeathed the said sum to his wife for her life and afterwards to his "next heir-at-law." It was held that the "heir-at-law," at the death of the testator was the person entitled and not the next-of-kin.

In *In re Rootes* (2), a testator gave all his personal estate, after payment of debts, to his wife for life, and upon her death he gave whatever should remain, after payment of various legacies, equally between the heirs of his late uncle, W. Neve, J. Neve, and his aunt, P. Francis, all three of whom were dead at the date of the will. It was held that the word "heirs" applied to the heirs-at-law of the three persons named, and not their next-of-kin.

If these cases are to be followed, heir must mean *persona designata.*

MacDermott for the defendant, James Ball:—

The first question to be decided was whether or not Hugh Ball took an absolute interest. The gift was neither executory nor substitutionary.

Section 29 of the Wills Act does not apply.

No estate tail arises by necessary implication.

I submit that *In re Conboy's Estate* (3) rules the present case.

That was a case where a will made in 1877 contained a devise, in effect to A. in fee simple, but in the event of A. having no heir or issue, over to B., a nephew of A., upon A.'s death.

It was held that section 29 of the Wills Act did not apply; that the same construction must be put upon the devise as would be put upon a devise to A. in fee simple, but in the event of his having no heir of his

(1) 27 L.J. (Ch.) 651.
(2) 29 L.J. (Ch.) 868.
(3) [1916] 1 I.R. 51.

Ch.D. 1933.

COWAN AND JOHNSON v. BALL.

body, or issue at his death, then over to B. in fee, and, accordingly that A. took an estate in fee simple, subject to a contingent executory devise over on his death.

There is nothing on the face of the will in the present case to rebut the presumption that the will is supposed to speak from the death. "Heir" cannot mean heir-at-law. The word "heir" is not used in its technical sense in the will.

The law is correctly stated in *Jarman on Wills* (6th edition), vol. 2, p. 1070.

In *In re Philps' Will* (1), a testator by his will directed that a sum of stock should after the death of his wife be divided among his children then living, or their heirs. It was held by Lord Romilly, M.R., that by heirs were meant the statutory next-of-kin of the children.

I submit that the word "heir" should be read as "heirs" not "heir."

I cannot find any reason for the decision in *Gann v. Gregory* (2).

The probate is not necessarily conclusive. If the probate is conclusive why have the Courts looked at original wills, as they have done on several occasions.

Porter, K.C. (in reply):—

In *Halsbury*, volume 28, par. 1482, the law is stated as follows:—"A gift over of property, given to a "person absolutely, in the event of his death is con-"strued as a gift over in the event of his death before "the period of distribution or vesting, unless some "other period is indicated by the context.

"If, therefore, the gift is immediate, and there is a "gift over in case of the donee's death, as a con-"tingency, the gift over *primâ facie* takes effect only "in the case of the donee dying in the lifetime of the "testator, as an alternative gift, and if the gift is post-"poned to a life estate, the gift over *primâ facie* takes "effect only on a death before the tenant for life, as "an alternative gift; or if the context requires, the

(1) L.R. 7 Eq. 151. (2) 3 De G.M. & G. 777.

"gift over may be construed as referring to death "before vesting." *Cur. adv. vult.*

MEGAW, J.: The facts in this case are simple.

George Ball, deceased, whose will I have to construe, was possessed of a small farm and some money, chattels, etc. The farm, I was told, was held by a tenure under which it has to be dealt with as personal property.

By his will dated 28th February, 1895, the above testator provided as follows:—"I leave and bequeath "to my son, Hugh Ball, my farm of land, money, "goods and chattels, which I may die possessed of or "entitled to," subject to certain legacies. After bequeathing certain legacies he proceeded to elaborate the devolutions of the bequeathed property by directing that should Hugh Ball die without issue or an heir the property comprised in the bequest should go to his brother John or his heirs.

Probate of the will was granted on the 18th December, 1895, to Hugh Ball and John Johnstone, the executors.

Hugh Ball shortly after the death went into possession in due course of administration and remained in possession till his death on 26th July, 1932. He married some years before his death but there was no issue. His co-executor died on 22nd August, 1911, and the present plaintiffs are the executors of Hugh Ball and consequently of George Ball, deceased.

The questions to be determined in the Summons are directed to ascertaining who is now entitled to the farm under the rather curious provisions of this very short will. In it, technical terms properly attributable to real estate are the characteristic feature; while there is no real estate to be dealt with.

The first point that meets me is a somewhat novel and interesting one. The probate of the will contains the marks of two obliterations, one of which is of no importance, but the other is or may be of vital importance; neither of these seems to have been initialed or specially attested. The original will is not available if it were right for me to consult it as it is stated to

Ch.D. 1933.

COWAN AND JOHNSON v. BALL.

MEGAW, J.

have been destroyed in the burning of the Record Office in the Fourt Courts, Dublin.

In the probate before me the following clause on which the whole case turns is :—" I also direct should " my son, Hugh Ball, die without issue or an heir, I " allow my said farm, money, goods and chattels to " go to my brother, John Ball, or his heirs," subject to certain legacies.

Now in the second place where the word " heir " occurs in this clause, it appears in the form " heirs " with the " s " at the end struck out but still visible showing a correction of the form apparently originally written—and I have to determine at the outset whether I should interpret the will by reading the word in its original or amended form.

Fortunately I am not without authority on this point and have been referred to *Gann v. Gregory* (1). [His Lordship then read the head note and judgment in that case.]

It has been contended that this case has not been followed and that it is inconsistent with the general rule or presumption that in a will alterations and erasures are made after execution ; at highest this is a presumption capable of being rebutted.

In the present case apart from authority I should on reading the will as a whole—if the probate form of script fairly represents the original—be prepared to hold that the presumption was displaced. There are two obliterations—the first is merely the striking out of the duplicate words " I leave " in the gift of a small legacy, a grammatical correction. The second is that with which I have to deal and I should be disposed to think that this was made to harmonize the word with the form of expression that immediately preceded it—not that I think that the draftsman of the will had the foggiest notion of the legal considerations that might arise from the use of either word.

I am bound by the great authority of *Gann v. Gregory* (1), and it has never been dissented from or questioned, and with its reasoning, if I may say so, I respectfully agree.

(1) 3 De G. M. & G. 777.

In interpreting the will, therefore, I must read the word in controversy as "heir" not "heirs" and as the same word occurs twice in the one sentence I must give it the same meaning in both settings.

Had it not been for the numerous decisions which must be followed so far as I can reconcile them, I should have little difficulty in coming to a conclusion as to the real intention of the testator. As it is I must try to follow the lines hallowed by authority and decide how the use of the word "heir" affects the devolution of this little farm. Nothing turns on the use of the word "allow" as in the vernacular it is equivalent to direct or order.

The gift to Hugh is by the first clause in terms absolute. Subject to the legacies there comes the executory limitation should he "die without issue or "an heir." So long as there was an heir to John, who could take a gift over, there must be an heir to Hugh, and if the "heir" in the will is to have any effect it must be something different from its primary meaning. If I were reading the will in the primary meaning I should at once hold that Hugh did not die without an heir and therefore the gift over did not arise, but the cases seem to show that in a situation like the present I should hold that heir means heir of body. As regards realty this would probably have created an estate tail and had the property been personalty and the first interest given been merely a life interest these words would by implication have increased that to an absolute interest. In this case the first interest is absolute and the question is: Has this been made subject to an executory limitation over?

Had the word "heir" been read in its ordinary sense the answer would clearly have been in the negative. As it is, section 29 of the Wills Act, in my opinion, has no application. The property is personal and the use of the word "heir" differentiates the case from a case where "issue" was the only term used.

It is with the farm only that I am concerned and after much hesitation I have come to the view that the gift over does not take effect and I am of opinion that the

Ch.D. 1933.

COWAN AND JOHNSON v. BALL.

MEGAW, J.

case of *Weldon v. Weldon* (1), governs my decision, I must consequently hold that Hugh Ball took an absolute interest.

Solicitor for the plaintiffs : *John Johnson.*

Solicitor for the defendant George Ball : *William Shaw.*

Solicitor for the defendant James Ball : *J. Dunville Coates.*

J. McC.

(1) [1911] 1 I.R. 177, 184.

CHURCH v. TWEEDIE (1).

C.A. 1933.

April 24.

(1933. No. 357.)

Practice—Remittal to inferior court—Personal injuries—Visible means—Primâ facie cause of action—Cause of action fit to be prosecuted in the superior court—Common Law Procedure (Ir.) Act, 1870 (33 & 34 *Vict., c.* 109) *section* 6.

The plaintiff, a child aged 3½ years, sued by his father and next friend to recover damages for personal injuries which, it was alleged, were caused by the negligence of the defendant or his servants.

The defendant deposed that the plaintiff's father and next friend had no visible means beyond remuneration received by him of £3 per week as a sergeant instructor in the special constabulary.

The defendant also stated that he had a good defence to the action both at law and on the merits.

In reply, the plaintiff's mother averred, without giving any further particulars, that the defendant, his servant or agent, so recklessly and negligently drove and managed a motor car that he collided with and knocked down the minor plaintiff, thereby causing serious personal injuries and permanent disablement. She also stated that her husband had informed her that his income was £16 per month and not £3 per week.

Held, by the Court of Appeal (Andrews and Best, L.JJ.) that the plaintiff had failed to establish "visible means" within the meaning of section 6 of the Common Law Procedure Act, 1870.

Held, also, that the plaintiff had failed to disclose a cause of action fit to be prosecuted in the Superior Courts.

APPEAL from a decision of Moore, L.C.J., remitting the action to the Recorder of Belfast. The action was for damages for personal injuries to the plaintiff by the negligence of the defendant or his servants, and the plaintiff sued by his father and next friend. In his affidavit in support of the motion to remit, the defendant stated that the plaintiff, meaning the plaintiff's father and next friend, was a sergeant instructor in the Ulster special constabulary, and beyond the remuneration received by him in that behalf, namely about £3 per week, he had no other visible means of

(1) In the Court of Appeal before Andrews and Best, L.JJ.

C.A. 1933.

CHURCH v. TWEEDIE.

paying the defendant's costs in the action should a verdict not be found for him.

He also stated that he had a good defence to the action both at law and on the merits. Continuing his affidavit he gave his account of how the accident occurred as follows :—David Herbert Tate, who was driving his car at the time of the accident, informed him that on Sunday, 18th December, 1932, at roughly 9-45 p.m., he was driving the car along Donegall Road, Belfast, about three feet from the footpath on the left-hand side. There was another car preceding him travelling on the centre of the road about thirty yards in front. The plaintiff ran from behind the car preceding the defendant's driver and in front of the defendant's car. The defendant's driver informed the defendant that he immediately applied the brakes in an endeavour to avoid the child but was unable to do so.

In reply the plaintiff's mother made an affidavit which contained the following statements :—On the 18th December, 1932, the defendant, his servant or agent, so recklessly and negligently drove and managed a motor car that he collided with and knocked down the minor plaintiff in the action, on the Donegall Road, thereby causing serious injuries and permanent disablement. Prior to the accident, the plaintiff was a normal, healthy and intelligent child.

She also stated that she was informed by her husband that his income was £16 per month and not £3 per week, as stated in the defendant's affidavit.

G. B. Hanna, K.C., and *G. B. Hanna (Junior)*, for the plaintiff :—

In *Doherty v. Mullins* (1), it was held that a farmer holding two farms agreed to be purchased under the Land Purchase Acts, consisting of 42 acres, valued at £13 per annum, and in respect of which the interest payable in lieu of rent was only £8, had visible means within the meaning of the Common Law Procedure (Ireland) Act, 1870, section 6.

(1) 43 I.L.T.R. 174.

We submit that the plaintiff has established " visible " means " in the present case.

We also contend that the plaintiff has a cause of action fit to be prosecuted in the superior courts.

In *Maher v. Sun Patent Improved Fire Lighters Co., Ltd.* (1), a case where a young boy was very seriously injured by burns received while engaged in the work of attending a furnace and dipping fire lighters in a resin dipping tank, the Court, without deciding whether a *primâ facie* cause of action was shown on the affidavits, held that the case was one which ought to be investigated by the Superior Court.

In *Thomson v. Dublin United Tramway Company* (2), the plaintiff was a passenger on top of a tramcar which stopped at a siding to allow another car to pass. While the car was so stopped the plaintiff started to get off, and when he was at the top of the staircase the car was re-started, and he was thrown off and so seriously injured that he lost a situation he held as clerk. It was held, reversing Boyd, J. (Fitzgibbon, L.J., dissenting) that the action should be retained in the Superior Court.

In the circumstances that exist in the present case, the door of the Court should not be closed against the plaintiff. The case ought to be retained in the Superior Courts.

We rely on *Eccles v. Murphy* (3). *Campbell v. Donnelly* (4) does not apply to the present case.

Flower v. Archdale and Burke (5) was an application to remit an action to the County Court, the affidavits showed that the plaintiff was the incumbent of a parish in County Leitrim, with an annual stipend of £220 a year ; that he was trying to arrange with his creditors, who had sued him unexpectedly, and that there were two judgments against him in the hands of the sheriff.

It was held by the Court of Appeal, Fitzgibbon, Walker and Holmes, L.JJ., that there was evidence of visible means, and that consequently the action should not be remitted.

(1) 4 N.I.J.R. 55.
(2) 3 N.I.J.R. 36.
(3) 66 I.L.T.R. 45.
(4) 11 I.L.T. 176.
(5) 4 N.I.J.R. 170.

C.A. 1933.

CHURCH v. TWEEDIE.

Murphy, K.C., and *J. D. Chambers* for the defendant :—

We submit that the authorities do not bear out the propositions advanced on behalf of the plaintiff.

Dowling v. Birney (1) is very similar to the present case. In that case it was held that as the plaintiff had no visible means, it was necessary for her, in order to retain the action in the Superior Courts, to show in the first place, that she had *primâ facie* a cause of action ; that the statement or suggestion in her affidavit did not sufficiently disclose a cause of action, and that the action should be remitted.

In *Campbell v. Donnelly* (2), it was held that a quartermaster, having £17 per month, has not " visible " means " within the meaning of the Common Law Procedure Act of 1870.

The second question is whether or not the plaintiff has disclosed a cause of action fit to be prosecuted in the Superior Courts.

We submit that the principle applicable is that the plaintiff has got to give some *primâ facie* evidence that goes to show that he has a cause of action.

Both *Maher v. Sun Patent Improved Fire Lighters Co., Ltd.* (3) and *Thomson v. Dublin United Tramway Company* (4), looking at their facts, fail to establish that once serious injuries have been proved, the Court will disregard the question whether there is a cause of action or not. In any case these cases have not the same authority as those contained in the official reports.

We rely on *Callan v. Duffy* (5) where the Court remitted an action for slander brought by a Petty Sessions Clerk, who had a salary of £180 a year, on the ground of no " visible means."

The order of the Lord Chief Justice should be affirmed.

G. B. Hanna, K.C. (in reply) :—

The plaintiff's father's salary could be reached and made available for the defendant's costs.

(1) 36 I.L.T.R. 33.
(2) 11 I.L.T. 176.
(3) 4 N.I.J.R. 55.
(4) 3 N.I.J.R. 36.
(5) 29 I.L.T. 617.

ANDREWS, L.J. (delivering the judgment of the Court): This is an appeal by the plaintiff from an order of the Lord Chief Justice remitting the action for trial before the Recorder of Belfast. The plaintiff, who is a child of 3½ years of age, sues by his father and next friend to recover damages for personal injuries sustained by him by reason of the alleged negligence of the defendant or his servants. In his affidavit in support of the remitting motion the defendant stated that the plaintiff (meaning thereby the plaintiff's father and next friend) is a sergeant instructor in the Ulster special constabulary, and beyond the remuneration received by him in that behalf, namely, about £3 per week, he has no other "visible means" of paying his costs. He further stated that he had a good defence to the action both at law and on the merits, and sets out, on information and belief, his account of how the accident causing the injuries occurred, when his car driven by one David Herbert Tate collided with the plaintiff. In reply, the plaintiff's mother has made an affidavit in which, without giving any particulars whatever, she avers that "on 18th December, 1932, the defendant, "his servant or agent, so recklessly and negligently "drove and managed a motor car that he collided "with and knocked down the minor plaintiff in the "action, on the Donegall Road, in the County of the "City of Belfast, thereby causing serious personal "injuries and permanent disablement." She also states that her husband has informed her that his income is £16 per month and not £3 per week as stated.

Two points are relied on by the defendant:—(1) That the plaintiff's father and next friend has no "visible means"; and (2) that the plaintiff has failed to disclose any cause of action.

As regards the first of these contentions we have been referred to several authorities such as *Campbell v. Donnelly* (1), in which it was held by the Court of Common Pleas that a quartermaster who was in receipt of £17 per month had no "visible means." Without, however, referring to these authorities in

(1) 11 I.L.T. 176.

C.A. 1933.

CHURCH v. TWEEDIE.

ANDREWS, L.J.

detail I may say that unless we were prepared, which we are not, to overrule *Callan v. Duffy* (1), we must hold that the plaintiff has failed to establish "visible "means." In that case an action for slander brought by a Petty Sessions Clerk who had a salary of £180 a year was remitted, the Court holding that this did not amount to "visible means." That case seems to us to be conclusive especially when one remembers the difference between the value of money at the present time and that which it possessed in 1895 when the case was decided.

On the second question we also hold with the defendant. The affidavit of the plaintiff's mother is wholly unsatisfactory. She was not an eye-witness of the accident; she omits to state her source of information; and, finally, the statement purporting to deal with the accident is absolutely silent as to the facts of the occurrence, and consists merely of a bald averment of negligence such as one would properly find in a statement of claim. In the circumstances we are of opinion that the plaintiff has failed to disclose a cause of action. Accordingly, it follows that he has not a cause of action fit to be prosecuted in the Superior Court. The appeal must be dismissed with costs.

Solicitor for the plaintiff: *S. V. Tughan.*
Solicitor for the defendant: *J. Morris McKee.*

J. McC.

(1) 29 I.L.T. 617.

ATTORNEY-GENERAL v. JAFFÉ (1).

C.A. 1933.

Jan. 16, March 6, May 4, 17. June 20.

Succession duty—Person assessed residing in England—Right of Appeal—Succession Duty Act, 1853, *section* 50—*Implied repeal—Government of Ireland Act*, 1920, *section* 21—*Revenue—Practice—Issue and service of writ out of the jurisdiction—R. S. C.*, 1905 *Order* 68 (*Revenue*)—*Leave of Court.*

The intended defendant, who resided in London, was assessed as an accountable party for succession duty in respect of the cesser of a moiety of an annuity of £2,000, charged upon lands situate in Northern Ireland. The intended defendant gave notice of his intention to appeal against the said assessment to the High Court of Justice in England under section 50 of the Succession Duty Act, 1853.

On an application by the Attorney-General for the leave of the Court to issue and serve a writ of subpoena out of the jurisdiction to recover the amount of the said assessment.

Held, by the King's Bench Division (Moore, L.C.J. and Brown, J.), that the right of appeal under section 50 of the Succession Duty Act, 1853, was not repealed by the Government of Ireland Act, 1920, and, accordingly, that no Order should be made.

Held, by the Court of Appeal (Andrews, Best, L.JJ., and Megaw, J.) that it was not necessary for the Crown to come to the Court for liberty to issue and serve writs of subpoena in revenue matters out of the jurisdiction in any part of the United Kingdom, and that for this reason no Order should be made.

R. v. Gardiner [1920] 2 *I.R.* 339 *overruled.*

Ex Parte Application on behalf of the Ministry of Finance for Northern Ireland for liberty to issue and serve a writ of subpoena out of the jurisdiction, at the suit of His Majesty's Attorney-General, upon Arthur Daniel Jaffé, who resided in London, for the recovery of £190 15*s.* 0*d.* succession duty assessed upon him in respect of the cesser of a moiety of an annuity of £2,000 on the death of his mother, Pauline Jaffé, who died on 16th August, 1929.

The lands upon which the annuity was charged are situate in Northern Ireland, and the assessment was made under section 5 of the Succession Duty Act, 1853,

(1) In the Court of Appeal before Andrews, Best, L.JJ., and Megaw, J.

C.A. 1933.

ATTORNEY-GENERAL v. JAFFÉ.

as adapted by Article 14 of the Government of Ireland (Adaptation of Taxing Acts) Order, 1922, made in pursuance of the Government of Ireland Act, 1920. No payment in respect of the said assessment had been made by the intended defendant. The intended defendant had given notice of his intention to appeal against the assessment by petition to the High Court of Justice in England, but no such appeal had been brought.

Attorney-General and *J. G. Dougherty* for the Ministry of Finance :—

Section 50 of the Succession Duty Act, 1853, in so far as it gives taxpayers resident in England and Scotland the right to appeal to the Courts in England or Scotland according to the place in which they reside in respect of succession duty assessed upon property situate in Northern Ireland, is impliedly repealed by the Government of Ireland Act, 1920. Before the Government of Ireland Act, 1920, a taxpayer who was dissatisfied with an assessment made under section 5 of the Succession Duty Act, 1853, could appeal by Petition of Right under section 50 of that Act. At that time there was only one exchequer and the duty wherever assessed, went into that exchequer. But now the matter is on an entirely different basis for by the Government of Ireland Act, 1920, not only is the jurisdiction in legal matters separated, but constitutionally the two countries are separate entities.

Section 21 of the Government of Ireland Act, 1920, gives the Parliament of Northern Ireland power to impose, charge, levy and collect taxes within its jurisdiction, with certain exceptions.

This is not one of the taxes reserved under that section, and it is one over which the Parliament of Northern Ireland has full power of collecting and assessing.

Under section 69 of the Government of Ireland Act, 1920, the King, by Orders in Council, has power to make adaptation orders, but no adaptation order, in regard to this matter, was ever made.

The Legislature in giving this power, under section 69, to make adaptation orders contemplated in express terms that the Government of Ireland Act, 1920, would repeal by implication some earlier enactments. [He referred to *Maxwell on The Interpretation of Statutes*, pages 292 and 293.]

The exercise in Northern Ireland by the English Courts of the jurisdiction conferred on them by section 50 of the Succession Duty Act, 1853, would be entirely contrary to the jurisdiction conferred by the Government of Ireland Act, 1920.

Jaffé, the intended defendant (who appeared out of courtesy to the Court as an *amicus curiae*):—

Your Lordships have no jurisdiction to make the order sought because, at present, the Ministry of Finance has no cause of action against me.

Section 50 of the Succession Duty Act, 1853, provided that where the Commissioners made an assessment that that assessment was subject to appeal by a dissatisfied party and it was only after the appeal had failed that a right of action accrued to the Crown which it could enforce.

Section 50 is intimately bound up with the right of appeal and the right to appeal cannot be taken away and the right to tax remain.

For many years before the Act of Union there were two exchequers. It is only a matter of account between the two countries. Northern Ireland is still a part of the United Kingdom. It is not a dominion, which in regard to the enforcement of revenue laws is treated in England as a foreign country.

State v. Little (1), is decided under Article 73 of the Free State Constitution which corresponds to section 61 of the Government of Ireland Act, 1920. There it was held that the Fugitive Offenders Act, 1881, continued to be of full force and effect in the Irish Free State by virtue of the provisions of Article 73, and that it was not inconsistent with the provisions of the Constitution.

You must presume there is a right of appeal in a taxing case unless there are express words to the contrary.

(1) [1931] I.R. 39.

C.A. 1933.

ATTORNEY-GENERAL v. JAFFE.

SIR WILLIAM MOORE, L.C.J.

March 6.

MOORE, L.C.J.: The question to be decided here is whether or not the Respondent has a right to have his appeal against the assessment of the Commissioners decided by the Courts in England. The rights of the Respondent existed under section 50 of the Succession Duty Act, 1853 (16 & 17 Vict., C. 51). The section is as follows:—"It shall be lawful for any accountable "party dissatisfied with the assessment of the Com- "missioners, upon giving, within twenty-one days "after the date of such assessment, notice in writing "to the Commissioners of his intention to appeal "against such assessment, and a statement of the "grounds of such appeal, such statement to be furnished "within the further period of thirty days, to appeal "by petition accordingly to Her Majesty's Court of "Exchequer in England, Scotland, or Ireland, accord- "ing to the place in which the Appellant shall be "resident. . . ." The rights, if any, of the Respondent are under that section. It was all a matter of convenience. When taxation was first imposed it was very unpopular, and the Government to make it as easy as possible for taxpayers to deliver their accounts granted them the privilege of delivering their accounts and of appealing against assessments with which they were dissatisfied, where they resided. This was a special privilege given to a very small class of persons. In this case it is not the prosecutor who has the choice of the venue but the defendant. That would still be the law if the privilege has not subsequently been taken away. This is a taxing Statute and should therefore where its terms permit it, be construed in favour of the subject.

The argument of the Attorney-General was based principally upon section 21 of the Government of Ireland Act, 1920. The material parts of the section are as follows:—

"The power of the Parliaments of Southern "Ireland and Northern Ireland to make laws shall "include power to make laws with respect to the "imposing, charging, levying and collection of "taxes within their respective jurisdictions, other "than . . . and the Governments of Southern

"Ireland and Northern Ireland shall have full "control over the charging, levying and collection "of such taxes as their respective Parliaments have "power to impose and proceeds of all such taxes "shall be paid into the Consolidated Fund of "Southern Ireland or Northern Ireland, as the case "may be."

The question to be decided here is whether the small privileged class of people has lost its privilege by reason of any subsequent legislation. And in particular did anything in the Government of Ireland Act, 1920, which, in giving the Parliament of Northern Ireland its powers, repeal by implication the privilege granted by section 50 of the Succession Duty Act, 1853. I do not think that it did. I do not see any inconsistency between the Acts. Section 69 of the Government of Ireland Act, 1920, allows the King by Orders in Council to make adaptation orders ; but no order affecting this matter was ever made. I do not see what was to prevent the Minister of Finance from going to the English Court to sue Mr. Jaffé, or Mr. Jaffé from appealing to the English Courts, and I therefore think that a writ of subpoena should not go in this case. And if on the question of convenience I were asked to go further I would say that it was not fair that a Government department should pursue a man resident in London in a matter of this sort. It would be a hardship on Mr. Jaffé to make him come over to Belfast to interview official after official at the Ministry of Finance when they could just as well work it through the Commissioners of Inland Revenue in London.

I think there is a *casus omissus* on the whole case and that the motion of the Attorney-General should accordingly be refused.

BROWN, J. : I concur and for substantially the same reasons as those given by the Lord Chief Justice. The law existing in Ireland is that set out in section 50 of the Succession Duty Act, 1853, under which a party dissatisfied with the assessment of the Commissioners had right of appeal to the Court of Exchequer in England, Scotland or Ireland according to the place in which the appellant shall be resident.

C.A. 1933.

ATTORNEY-GENERAL v. JAFFÉ.

BROWN, J.

Here we have a privilege contained in a taxing Act and taxing Acts are always construed by the Courts in favour of the subjects. The law contained in section 50 of the Succession Duty Act, 1853, is still in force in Ireland unless there is something in the Government of Ireland Act, 1920, which repeals it. Where a special privilege is granted that privilege cannot be taken away by a mere implied repeal, but must be by a direct repeal by Act of Parliament.

I am of opinion that section 50 of the Succession Duty Act, 1853, is still the law in these Courts and I agree that no order should be given.

The Attorney-General appealed to the Court of Appeal.

During the hearing the question was raised in the Court of Appeal as to whether in revenue matters the Crown, as decided in *Rex v. Gardiner* (1), is bound to obtain leave of the Court to issue and serve writs of subpoena outside the jurisdiction.

The Attorney-General (*A. B. Babington, K.C.*) and *J. G. Dougherty* for the Ministry of Finance :—

The decision in *Rex v. Gardiner* (1), is erroneous and the Crown is under no obligation to come to the Court for liberty to issue and serve writs of subpoena outside the jurisdiction except in special cases under Order 65, rules 5 and 6.

The Crown has never been bound by the Judicature Act, 1877, nor by rules of Court made under that Act. The position is the same as under section 42 of the Petty Sessions (Ireland) Act, 1851.

The words " so far as they are applicable and subject " to all necessary modifications " in Order 68, rule 3, mean that these rules, only in so far as they are not inconsistent with any previous rights attached to the Crown, are applicable to all proceedings afterwards had in revenue matters.

Order 2, rule 5, never applied to revenue matters.

(1) [1920] 2 I.R. 339.

C.A. 1933.

ATTORNEY-GENERAL v. JAFFÉ.

Order 68, rule 1, shows that it was never intended that these Rules should deprive the Crown of any of its existing rights. [He referred to *Attorney-General v. Constable* (1).

Cur. adv. vult.

ANDREWS, L.J.

June 20.

ANDREWS, L.J., delivered the judgment of the Court. This matter came on 16th January, 1933, before the Lord Chief Justice on an application for liberty to issue and serve a writ of subpoena at the suit of the Attorney-General for Northern Ireland out of the jurisdiction upon Arthur Daniel Jaffé, who resides at Chelsea, London, for recovery of the sum of £190 15*s.* 10*d.* for succession duty assessed upon him in respect of the cesser of a moiety of an annuity of £2,000 on the death of his mother, Dame Pauline Jaffé, who died on 16th August, 1929. The Lord Chief Justice directed that the motion should stand over, upon an undertaking that notice would be served upon the said Arthur Daniel Jaffé of the adjournment and of the date upon which it would be relisted for further argument. The adjourned motion ultimately came again before the Lord Chief Justice and Brown, J., on 6th March, 1933, when, after hearing Counsel for the intended plaintiff, and after hearing the intended defendant, who, as the order states, "appeared as "*amicus curiae* out of courtesy to the Court," it was ordered that the application be refused. The ground of the decision, as appears in the written judgments of the members of the Court, was that under section 50 of the Succession Duty Act, 1853, it is lawful for a dissatisfied accounting party "to appeal by petition to "Her Majesty's Court of Exchequer in England, "Scotland, or Ireland according to the place in which "the appellant shall be resident . . ." This privilege of the defendant in having a choice of venue was not in the opinion of the Court impliedly repealed, as was contended by the Attorney-General, by section 21 of the Government of Ireland Act, 1920, or other subsequent legislation. Further, the Court considered on the question of convenience that "it was not fair

(1) 4 Ex.D. 172.

C.A. 1933.

ATTORNEY-GENERAL v. JAFFÉ.

ANDREWS, L.J.

"that a Government department should pursue a "man resident in London in a matter of this sort."

When the appeal was listed for hearing in this Court we declined to direct the service of any notice of the hearing upon the intended defendant as we considered we had no jurisdiction to do so. On his own responsibility the Attorney-General gave informal notice of the date fixed for the hearing to the intended defendant, who replied that, as the Court had not invited him to appear as *amicus curiae*, he would not appear. In taking up this attitude he acted in our opinion quite properly.

During the course of the argument of the Attorney-General a question was raised as to whether there was any necessity for the Attorney-General to obtain such an order as that which he sought, or whether same was unnecessary on the ground that the King's writ, at the suit of his Attorney-General, runs in any part of the United Kingdom without the leave of the Court. The Attorney-General stated that his application was occasioned by the decision in *Rex v. Gardiner* (1), which, he said, reversed the previous settled practice in such cases and made it necessary to obtain the leave of the Court for the issue and service of a writ of subpoena for the commencement of an action on the revenue side against a defendant resident in England. After the case had been opened we adjourned the matter to enable the Attorney-General to consider whether he wished to question the authority of *Rex v. Gardiner* (1), and to contend that the leave of the Court was unnecessary for either the issue or service of the writ. On the adjourned hearing the Attorney-General intimated that he accepted this position, and that in his submission *Rex v. Gardiner* (1) was wrongly decided. It is obviously proper that this point should be first determined ; as, if in our opinion it be unnecessary to obtain the leave of the Court, nothing further will be left for us to determine.

We have now very carefully considered the matter and are clearly of opinion that the decision in *Rex v. Gardiner* (1) cannot be supported. The foundation of

(1) [1920] 2 I.R. 339.

the judgment appears to be the admission of Mr. Wylie, accepted by the learned judge, as he says, "without "further inquiry" that the proceeding came within R.S.C. 1905 Order 68 (Revenue). This admission was made and the judgment of the Court was apparently given without any reference being made to rule 1 of that Order, which provides that: "Nothing in this Order "shall be construed to prejudice the Prerogative of the "Crown." Now, in our opinion, long before the passing of the Judicature Act or the making of the rules and orders thereunder, it was the prerogative right of the Crown to issue and serve a writ in a revenue matter in any part of the kingdom without the leave of the Court. The King can collect his revenues from his subjects who are resident in the kingdom through such of his Courts as he pleases without the leave of the Court. In the judgment in *Rex v. Gardiner* (1), reliance is placed on rule 3 of Order 68, which (with certain exceptions not including Orders 2 and 11 relating respectively to issue and service out of the jurisdiction) applies the Judicature Act Orders to an action which, previously to the Act of 1877, might have been commenced by information in the Court of Exchequer in Ireland. It appears, however, to us that this argument loses its entire weight when one observes that this rule is introduced with the words :— "Save as otherwise provided by this Order" (cf. rule 1 *supra*), and that the application of the other Orders to such a revenue action is further expressly limited and qualified in rule 3 by the words "so far as they "are applicable and subject to all necessary modi- "fications." In our opinion no rules nor Orders are "applicable" which would fetter or interfere in any way with the prerogative rights of the Crown.

Such rights of the Crown are well illustrated by *The Attorney-General and the Humber Conservancy Commissioners v. Constable* (2), where it was held that the prerogative of the Crown to intervene in actions affecting the rights or revenue of the Sovereign has not been affected by the Judicature Acts. In his

(1) [1920] 2 I.R. 339. (2) 4 Ex.D. 172.

C.A. 1933.

ATTORNEY-GENERAL v. JAFFÉ.

ANDREWS, L.J.

judgment, Kelly, C.B., refers to the case of *Attorney-General v. Barker* (1), as clearly shewing that it was settled law before the Judicature Acts that it was part of the prerogative of the Crown that the Sovereign was entitled to be an actor in any litigation affecting the rights of the Crown ; and he expressed the clear opinion that the exclusive jurisdiction and procedure of the Court in matters affecting the revenues and rights of the Crown were preserved as before the Judicature Acts. This conclusion, he arrived at, both on the provisions of the English Act and Orders, and also on the consideration, which, he said, was conclusive on the point, that by the common law of the realm and from time immemorial the prerogative rights of the Crown cannot be restricted by an Act of Parliament without express words ; and that in the Judicature Acts there are certainly no words which limit the right of the Crown in respect of the decision of questions affecting the revenue.

Both Barker's case and Constable's case were cited and acted upon subsequently in *Stanley (Lord) v. Wild & Son* (2), and in *Ulmann v. Cowes Harbour Commissioners* (3).

The view which we have expressed that it is unnecessary for the Crown to get leave to issue or serve a writ of subpoena out of the jurisdiction in England or Scotland is in our opinion made still more clear by Statute and Rules. In the first place, section 23 (1) of the Inland Revenue Regulation Act of 1890, which was prior in date to the first Revenue Rules of 1900 and to the consolidated Rules of 1905, provides that "any writ of subpoena . . . issued out of the High "Court in relation to any proceeding for recovery of "inland revenue . . . may be served on any person "in any part of the United Kingdom." This section, with which may be compared section 248 of The Customs Laws Consolidation Act, 1876, refers only to service, not to the issue of the writ. In our opinion, in this the Legislature was merely recognising as unquestionable the absolute right of the Crown to the

(1) L.R. 7 Ex. 177.
(2) [1900] 1 Q.B. 256.
(3) [1909] 2 K.B. 1.

issue of the writ out of the King's Courts without the leave of the Court, and at the same time was removing any possible doubt which might have arisen in regard to its service as a result of the passing of the Judicature Act. We are unable to accept the view expressed upon this point in *Rex v. Gardiner* (1), that there is nothing in the section necessarily inconsistent with Order 11, rule 5, or that the effect of the section was intended to enable such a writ to be served in England and Scotland (or Ireland) as an additional cause of action to those enumerated in Order 11. Neither a writ of summons nor a writ of subpoena is a cause of action.

Further, we find in Order 68, rules 5 and 6, a strong additional argument in support of the view which we have expressed. These rules fall under the caption: "Service out of the jurisdiction"; but this, by the express terms of the rules, means service on a person who is a British subject (rule 5) or who is not a British subject (rule 6) "resident out of the jurisdiction in "any place except England or Scotland." Two points must here be noted. First, that even in such case the leave of the Court is not required for the issue of the writ. Secondly, if Order 2, rule 5, relating to service, and Order 11, relating to the issue of a writ for service out of the jurisdiction, apply to revenue cases, there was no sufficient, or, indeed, any reason for the making of the special rules 5 and 6 of Order 68, as these earlier Orders and rules would have been as adequate to deal with the cases of residence out of the jurisdiction in any place except England or Scotland as they would be where the defendant's residence is in England or Scotland. In our opinion the necessity for rules 5 and 6 of Order 68 arose from the fact that no other rules for service out of the jurisdiction applied to revenue cases, and that some rules were required to deal with service outside England and Scotland to which the prerogative of the Crown did not extend. We may mention that rules 5 and 6 correspond to sections 37 and 38 of The English Crown Suits Act, 1865, under which the leave of the Court is not required for either issue or service of the writ.

(1) [1920] 2 I.R. 339.

C.A. 1933.

ATTORNEY-GENERAL v. JAFFE.

ANDREWS, L.J.

We should add that in giving this decision we are merely restoring what, we have been assured, was the practice universally recognised and adopted in both England and Ireland prior to the decision in *Rex v. Gardiner* (1)—a practice which was not interfered with by that decision so far as relates to the service of English writs on British subjects resident in Northern Ireland.

We shall, accordingly, declare by our Order that in the opinion of this Court the leave of the Court is not required either for the issue or the service of the writ of subpoena out of the jurisdiction on the intended defendant; and, accordingly, that we make "no Rule" on the application. When the writ has been issued and served in the usual way it will be competent for the defendant, who has not been before us and who is not bound by our decision, to take such steps, if any, as he may be advised in reference thereto. No costs of this application can be allowed.

Solicitor for the Ministry of Finance: *J. H. B. Gunning.*

J. R.

(1) [1920] 2 I.R. 339.

INDEX.

ACKNOWLEDGMENT — STATUTES OF LIMITATION 80
See ADMINISTRATION.

ACQUIESCENCE—NUISANCE .. 50
See INJUNCTION.

ADMINISTRATION — INTESTATE'S ESTATE—STATUTE OF LIMITATIONS—"PRESENT RIGHT TO RECEIVE THE SAME"—ACKNOWLEDGMENT—*Law of Property Amendment Act*, 1860 (23 & 24 *Vict.*, *c.* 38), *s.* 13. H. D. died 10th January, 1911, intestate. S.D., his widow, thereupon entered into possession of the deceased's estate and effects and remained in possession until her death on 22nd January, 1932. On 11th May, 1922, S.D. took out a grant of administration to his estate. S.D. appointed C.D. one of the defendants the executor of her will. The plaintiff took out a grant *de bonis non* to the estate of the said H. D. and sought the aid of the Court in administering the estate. It was argued on behalf of the plaintiff that the extraction of administration by the said S. D. constituted an acknowledgment within the meaning of s. 13 of 23 & 24 Vict., c. 38, or alternatively that the period of limitation under s. 13 did not commence to run until a grant of administration had been taken out. *Held*, by the Court of Appeal (affirming the decision of Megaw, J.):—(1) That under s. 13 of 23 & 24 Vict., c. 38, the period of limitation runs from the date of the death of the intestate. (2) That the taking out of a grant of administration does not constitute an acknowledgment under s. 13 or otherwise prevent the Statute running in favour of the administrator. *In re Deeney, deceased: Deeney v. Doherty and Deeney.* [C.A. 80

APPEAL—REVENUE 189
See SUCCESSION DUTY.

ASSESSMENT—SUCCESSION DUTY—PLACE OF 189
See SUCCESSION DUTY.

ATTORNEY GENERAL—LACHES 50
See INJUNCTION.

BETTING—PETTY SESSIONS—JURISDICTION OF JUSTICES—PROCEDURE *before Justices—Charge against defendant of using premises for the purpose of betting with persons resorting thereto—Whether provisions as to information and summons in Betting Act*, 1853, *mandatory or permissive—Betting Act*, 1853 (16 & 17 *Vict c.* 119) *sections*, 1, 3, 8, 10, 11. The defendant was arrested on a warrant issued under section 11 of the Betting Act, 1853. He was brought before the Petty Sessions Court on the charge, that he being the user of a certain house situate in the city of B., did use the same for the purpose of betting with persons resorting thereto. On the charge being proceeded with before the magistrates a preliminary objection was raised to the hearing of the charge on the ground (*inter alia*) that no summons had been served on the defendant charging him with the offence alleged, a summons being, it was submitted, a condition precedent to any proceedings under the Act charging an offence. The magistrates dismissed the case without prejudice, but stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.) that the magistrates were wrong in point of law in dismissing the charge on the ground that the information or summons was a condition precedent to the exercise of their jurisdiction, and that it should be remitted to them to proceed according to law. *Rex* (*Lockhart*) *v. McKenna.* [K.B.D. 21

CASES—*Blake v. Beech* 4 Q.B.D. 614, considered 21
See BETTING.

——*Gann v. Gregory* 3 De G. M. & G. 777, followed 173
See WILL—CONSTRUCTION.

——*In re Johnson, Sly v. Blake* 29 C.D. 964, considered .. 80
See ADMINISTRATION—INTESTATE'S ESTATE.

——*In re Pardoe, McLaughlin v. Penny* [1906] 1 Ch. 265, considered 80

See ADMINISTRATION—INTESTATE'S ESTATE—STATUTE OF LIMITATIONS.

——*Rex v. Gardiner* [1920] 2 I.R. 339, overruled 189
See SUCCESSION DUTY—SERVICE OUT OF THE JURISDICTION.

——*Salford Corporation v. Hale* [1925] 1 K.B. 503, distinguished 34
See PUBLIC HEALTH.

——*In re Peel's Release* [1921] 2 Ch. 218, Commented on .. 150
See CHARITY—CY-PRES.

CHARITY—WILL—GIFT IN PERPETUITY—PARTICULAR CHARITY—LAPSE—CY-PRÈS—RESULTING TRUST. The testatrix having during her lifetime erected a school-house, vested, by her will, the said school-house in her trustees upon certain charitable trusts. By her will she also created a perpetual yearly rent charge which she vested in the said trustees to be expended in the maintenance of the said school and in paying a scripture reader residing on the said school premises. The testatrix died on 1st December, 1888, and the trusts were fully carried out until by the operation of the Education Act (Northern Ireland), 1923, the school, as such, was closed permanently in February, 1929. On a summons being brought to determine whether the said school premises and the said rent charge were still impressed with a charitable trust. *Held*, by Megaw, J., following the decision in *In re Peel's Release* (2), that although the trust was for a specific charitable purpose and disclosed no general charitable intention, there was no resulting trust to the testatrix's estate, and the trust should be administered *cy-près*. *In re Hardy, Nelson v. Attorney-General.* [Ch. D. 150

CONDITION—PRECEDENT OR SUBSEQUENT 89
See WILL—LEGACIES.

CONDITION—VALIDITY .. 47
See WILL—CONSTRUCTION.

CONSTRUCTION—CONDITION 47
See WILL—CONSTRUCTION.

CONSTRUCTION—HEIRS .. 173
See WILL—CONSTRUCTION

CRIMINAL CONVERSATION—PROOF OF MARRIAGE—EVIDENCE *of plaintiff and his wife—Sufficiency of—New Trial.* In an action for damages for criminal conversation by the defendant with the plaintiff's wife, evidence was given that the plaintiff and A. J. McC., his alleged wife had lived together as man and wife and were generally reputed as such. The plaintiff and his alleged wife gave evidence of the actual celebration of the marriage. No other evidence was given or produced on behalf of the plaintiff. The Judge decided that strict proof of a marriage being essential, the plaintiff had not discharged the onus of proof, and he directed the jury to find a verdict for the defendant, which they accordingly did. The plaintiff brought a new trial motion to set aside the verdict and judgment. *Held*, by the Court of Appeal (Moore, L.C.J., and Best, L.J.), that the evidence given by and on behalf of the plaintiff constituted sufficient prima facie proof of the marriage, and that the case should not have been withdrawn from the jury. The appeal was allowed and a new trial ordered. *McCarthy v. Hastings.* [C.A. 100

CRIMINAL LAW—REVENUE—FALSE INCOME TAX RETURNS—INDICTMENT—*Common law.* An indictment against a defendant for defrauding the Revenue alleged that he, on 1st September, 1923, unlawfully, with intent to defraud and to the prejudice of our lord the King and the Commissioners of Inland Revenue, in a return of his total income from all sources for the year ending 5th April, 1923, made and delivered to the Special Commissioners of Income Tax for the purpose of assessment to super tax did falsely state that his total income from all sources, less charges, amounted to the sum of £3,927 16*s.* 6*d.*, whereas in truth and in fact his total income from all sources, less charges, for that year largely exceeded that sum as he well knew at the time when he did so falsely pretend. There were similar counts for subsequent years. It was contended on behalf of the defendant that no such offence as was alleged in the indictment lay at common law against a taxpayer. *Held*, the indictment was good. *Rex v.* "*J.*"

BELFAST CITY COMMISSION 73

CY-PRÈS—GIFT IN PERPETUITY 150
See CHARITY.

DIRECTION—EVIDENCE requiring Explanation 158
See NEGLIGENCE—DIRECTION.

ELECTION OF REMEDY—PETTY SESSIONS OR COUNTY COURT 34
See PUBLIC HEALTH (IRELAND) ACT.

EVIDENCE—EXPLANATORY .. 158
See NEGLIGENCE—DIRECTION

EVIDENCE OF MARRIAGE .. 100
See CRIMINAL CONVERSATION.

EVIDENCE—IRISH FREE STATE STAMP 1
See STAMP.

EXPENSES OF EXECUTION OF PUBLIC WORKS—RECOVERY 34
See PUBLIC HEALTH (IRELAND) ACT.

EXPLANATORY EVIDENCE 158
See NEGLIGENCE—DIRECTION

FALSE RETURN—REVENUE .. 73
See CRIMINAL LAW—REVENUE.

HEIR—HEIRS—Meaning of .. 173
See WILL—Construction.

INDICTMENT—FALSE RETURN .. 73
See CRIMINAL LAW—REVENUE.

INFORMATION AND SUMMONS—PETTY SESSIONS .. 21
See BETTING.

INJUNCTION—*Erection of Public Lavatory on Highway—Nuisance—Ultra Vires—Delay in instituting proceedings—Acquiescence and Laches—Laches of Relator, whether attributable to Attorney-General.* The defendants resolved that a public lavatory should be provided for the town of R., and decided to apply to the Ministry of Home Affairs to be invested with urban powers under section 1 of the Public Health (Ireland) Act, 1896, in order that they might put into force the provisions of section 49 of the Public Health (Ireland) Act, 1878. An inquiry was held by the Ministry of Home Affairs to consider the propriety of the site selected by the defendants. The Ministry issued a sealed order, in which without specifying or expressly approving of any particular site, they declared the provisions of section 49 of the Act of 1878 to be in force within the limits of the contributory place referred to in a deposited map; and invested the defendants with the powers of an urban council under section 49 to be exercised within the limits of their area. The defendants held a special meeting to consider the Ministry's Order, when their assistant clerk informed them that they could now proceed with the erection of the public lavatory. The assistant clerk was directed to communicate with the secretary of the County Council to obtain their permission to have the public lavatory erected on the proposed site. The assistant clerk saw the clerk and was informed by him that the terms of the Ministry's Order made it unnecessary for the defendants to obtain the County Council's permission, so when the assistant clerk wrote to the secretary of the County Council, he did not ask for any permission as he had been directed to do, but merely stated that the defendants had been invested with urban powers for the purpose of erecting the lavatory, and that the site on which it was proposed to erect it, was that proposed by the defendants at the Inquiry which had been held. No reply was sent to this letter by the County Council, and no action was taken upon it. Subsequently tenders for the execution of the work were accepted, and the defendant's clerk wrote to this effect to the secretary of the County Council, and stated that the work would be proceeded with at the earliest possible date. No reply was sent, nor was any action, taken upon this letter by the County Council. For more than three months after the receipt of the first letter from the assistant clerk of the Rural District Council, which was written on 30th May, 1930, and which stated that the defendants had been invested with urban powers for the purpose of doing this work, the County Council were absolutely inactive. The defendants subsequently accepted a tender for the erection of the structure. The defendant's clerk wrote to the secretary of the County Council on 28th June, 1930, informing him of the fact and stating that the work would be proceeded with at the earliest possible

moment. On 13th September, 1930, the secretary of the County Council wrote to the defendant's clerk pointing out that the Order did not absolve the defendants from the obligation of obtaining the sanction of the County Council, and that as such sanction had not been obtained, he warned the defendants not to proceed further with the erection of the structure. Proceedings were subsequently brought by the Attorney-General at the relation of the County Council of Down, and by the County Council for a declaration that the defendants had wrongfully obstructed the public highway by erecting a public lavatory, and for a mandatory injunction to compel the defendants to pull down the structure and restore the highway. *Held*, by Andrews, L.J., that the delay on the part of the County Council had disentitled them to an injunction, but that the laches of a relator is not necessarily to be attributed to the Attorney-General, and while delay on his part with knowledge of the alleged violation of his rights cannot be ignored, there was no sufficient evidence of the Attorney-General's knowledge of the infringements of the rights of the public to justify a refusal of the mandatory injunction. *Attorney-General and County Council of Down v. Newry No.* 1 *R.D.C.* [Ch. D. 50

INTESTATE'S ESTATE—Limitation of Actions .. 80
See Administration.

INVITATION—Doctrine of .. 114
See Negligence—Harbour Authority.

ISSUE AND SERVICE OUT OF JURISDICTION .. 189
See Succession Duty.

JUDGE AND JURY—Functions of 114
See Negligence—Harbour Authority.

JURISDICTION—
Petty Sessions .. 21
See Betting.

JURISDICTION—Revenue .. 189
See Succession Duty.

JURY—Functions of Judge and Jury 114
See Negligence—Harbour Authority.

LACHES—County Council—Attorney-General .. 50
See Injunction.

LICENSEE OR INVITEE .. 114
See Negligence

LIMITATION OF ACTIONS—Intestate's Estate .. 80
See Administration.

MARRIAGE—Evidence of .. 100
See Criminal Conversation.

NEGLIGENCE — Direction — Onus Probandi—*Judgment for defendant at close of plaintiff's case—Plaintiff's evidence requiring explanation by defendant—New trial.* Where a cyclist had been killed in a collision between two motor cycles, no witness was produced who had actually seen the accident, but the damaged bicycles, on which the deceased and the defendant were respectively riding were found after the accident interlocked, close up against a stone wall on what was the deceased's proper side of the road, and the defendant was lying ten feet from his machine, on the same side of the road, while it was proved, as a reason for the defendant riding on his wrong side of the road, that the surface on his proper side was very rough, whilst that on the stone wall side was much better. At the conclusion of the plaintiff's case an application was made for a direction on behalf of the defendant on the ground that there was no evidence fit to go to the jury that the defendant had been guilty of any negligence. The Judge granted the application. *Held*, by the Court of Appeal [Andrews and Best, L.JJ. (dissentiente, Moore, L.C.J.)] that the plaintiff had established a sufficient *primâ facie* case, that she was entitled on the evidence to have her case submitted to a jury, and that the motion instituted by her for a new trial should be granted. *Held*, by Moore, L.C.J., that the plaintiff had failed to discharge the burden of proof which was placed upon her, and that the Judge was right in withdrawing the case from the jury. *Alexander v. Anderson.* [C.A. 158

NEGLIGENCE—Harbour Authority—*Duty towards persons using their premises—Workman employed by Shipowners—Licensee or Invitee—Invitation, mixed question of law and*

fact—Injury by Accident—Roadway—Obstruction consisting of shore or log used for docking vessels—Functions of Judge and Jury. The plaintiff, a greaser and fireman, employed by a Shipbuilding Company, was working on a motor ship moored at a wharf belonging to the defendants, who were paid by the Shipbuilding Company for the use of the wharf, but were in no way brought into privity with the plaintiff. At the end of his day's work the plaintiff handed in his check at the check office, and started for the tramway terminus situate outside the defendants' property, to take a tram home. On his way he tripped over a shore used for docking vessels, and sustained injury. He brought an action against the defendants, alleging negligence and breach of duty on their part in and about the care, control, and management of the roadway where the accident occurred. The defendants alleged that the plaintiff ought to have gone from the check office to the tramway terminus by a well-defined, well-kept and well-lighted roadway or track, and that the plaintiff in taking the route he did, did so to save himself travelling an extra distance of about forty yards, and took the risk of meeting any obstruction that might be met on that route. The evidence for the plaintiff was that the route he took was constantly used by workmen going between the tramway terminus and the wharf. Defendants' witnesses admitted this but said that this portion of the defendants' property was constantly used for storing shores, keel blocks, and other tackle, and that the route plaintiff should have taken was always clear, and was the recognized roadway to the wharf. The jury found that the plaintiff was not invited, but was licensed, by the defendants to use the route; that the shore constituted a dangerous obstruction on this route, and that the defendants knew or ought to have known of this obstruction; that the defendants were not negligent in placing or permitting to be placed the shore on the route, but that they were negligent in not removing the shore, and in not properly lighting the route; that the area through which the plaintiff had passed was used by the defendants for the carriage of shores, keel blocks, and other tackle; that the plaintiff was aware or should have been aware that the area was liable to such obstruction; that the plaintiff voluntarily took the risk of crossing this area, and that he took reasonable care for his own safety; and they assessed the damages at £100. On these findings the Judge gave judgment for the plaintiff. *Held*, by the Court of Appeal (Andrews and Best, L.J.J., and Megaw, J.), that the plaintiff was debarred from the recovery of damages by the findings of the jury in reference to his state of knowledge of the dangers to be anticipated in the area through which he chose voluntarily to walk in the dark, although another safe and well-lighted route, which was only forty yards longer, was provided for him. In these circumstances, if he chose to walk in the dark, he walked at his peril. *Held*, further that having regard to the other findings of the jury, no such duty was owed by the defendants as was implied in the question of negligence. *Gilmour v. Belfast Harbour Commissioners.* [C.A. 114

NUISANCE—
LACHES—ACQUIESCENCE 50
See INJUNCTION.

ONUS PROBANDI—PLAINTIFF'S EVIDENCE 158
See NEGLIGENCE—Direction.

PERPETUITY—CY-PRÈS .. 150
See CHARITY.

PERSONAL INJURIES—
REMITTING 183
See PRACTICE.

PETTY SESSIONS—EXPENSES OF PUBLIC WORKS 34
See PUBLIC HEALTH (IRELAND) ACT.

PETTY SESSIONS—JURISDICTION 21
See BETTING.

PRACTICE—REMITTAL TO INFERIOR COURT — *Personal injuries — Visible means—Prima facie cause of action—Cause of action fit to be prosecuted in the superior court—Common Law Procedure (Ir.) Act*, 1870 (33 & 34 *Vict.*, *c.* 109) *section* 6. The plaintiff, a child aged 3½ years, sued by his father and next friend to recover damages for personal injuries which, it was alleged, were caused by the negligence of the defendant or his servants. The

defendant deposed that the plaintiff's father and next friend had no visible means beyond remuneration received by him of £3 per week as a sergeant instructor in the special constabulary. The defendant also stated that he had a good defence to the action both at law and on the merits. In reply, the plaintiff's mother averred, without giving any further particulars, that the defendant, his servant or agent, so recklessly and negligently drove and managed a motor car that he collided with and knocked down the minor plaintiff, thereby causing serious personal injuries and permanent disablement. She also stated that her husband had informed her that his income was £16 per month and not £3 per week. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.) that the plaintiff had failed to establish " visible means " within the meaning of section 6 of the Common Law Procedure Act, 1870. *Held*, also, that the plaintiff had failed to disclose a cause of action fit to be prosecuted in the Superior Courts. *Church v. Tweedie.* [C.A. 183

PRACTICE—REVENUE—APPEAL 189
See SUCCESSION DUTY.

PREMISES USED FOR BETTING 21
See BETTING.

PROCEDURE—RECOVERY OF COST OF WORKS—PETTY SESSIONS—COUNTY COURT .. 34
See PUBLIC HEALTH (IRELAND) ACT.

PUBLIC HEALTH (IRELAND) ACT, 1878 (41 *&* 42 *Vict.*, *c.* 52) *ss.* 28, 250, 255, 260—SUMMARY PROCEEDINGS *to recover expenses of execution of Works—Private Improvement Expenses—Election of remedy—Expenses payable by annual instalments.* By section 28 of the Public Health (Ireland) Act, 1878, in case any street be not sewered, etc., to the satisfaction of the urban authority, such authority may require the owners of the adjoining premises to sewer the street, etc., within a time to be specified; and upon default of the owners the urban authority may execute the works, and may recover in a summary manner the expenses incurred by them in carrying out the work, from the owners in default according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by the Act, or the urban authority may by order declare the expenses so incurred to be private improvement expenses. Section 255 of the Public Health Act, 1878, provides that the sanitary authority may by order declare any such expenses to be payable by annual instalments within a period not exceeding thirty years with interest as therein provided, and any such instalments and interest may be recovered in a summary manner from the owner or occupier for the time being of such premises, with a similar right, of deduction on the part of the occupier from his rent as in the case of a private improvement rate under the Act. The plaintiffs in exercise of the powers vested in them under section 28 of the Public Health (Ireland) Act, 1878, served a notice upon the defendant amongst others, requiring him to level, pave and channel a certain lane within thirty-one days. The notice was not complied with and the plaintiffs executed the work themselves, and served upon the defendant a notice of the apportionment of the total expenses incurred upon the work as settled by their surveyor, setting forth the defendant's liability as £38 18*s.* 8*d.* Subsequently the plaintiffs served upon the defendant a demand for payment of this sum. No further step was, however, taken by the plaintiffs to recover this sum by summary procedure, and the claim became statute barred. The plaintiffs subsequently made an order in purported exercise of the power conferred upon them by the third paragraph of section 255 of the Act, that such expenses should be private improvement expenses and should be payable by two equal half-yearly instalments. Notice of the order was given to the defendant who subsequently received a demand for payment of the first instalment of £19 9*s.* 4*d.* The defendant did not pay the instalment. The plaintiffs under section 260 of the Act brought a civil bill for its recovery. *Held*, by Andrews, L.J., that as the plaintiffs had demanded from the defendant payment of his proportion of the expenses, they had elected to treat the amount due as a debt from him as owner, and that they could not

afterwards declare the expenses to be private improvement expenses. *Salford Corporation v. Hale* [1925] 1 K.B. 503 distinguished. *Held* also, on the authority of *West Ham Local Board v. Maddams* (1 Ex. D. 516) and *Tottenham Local Board v. Rowell* (1 Ex. D. 514 that the limitation of time mentioned in section 250 of the Public Health (Ireland) Act, 1878 (where it is provided that a complaint made in pursuance of the Act must be made within six months from the time when the matter of such complaint arose) applies as well to proceedings in County Courts as in proceedings before Justices. *Held* further, that the plaintiffs had no power under section 255 of the Act, or otherwise, to declare the expenses payable by two half-yearly instalments, the power conferred upon them by this section is to declare the expenses payable by annual instalments within a period not exceeding thirty years, and being statutory, it can only be exercised within the strict terms of the statute. *Bangor Borough Council v. Graham.* CO. DOWN ASSIZES. 34

REMITTING—VISIBLE MEANS 183
See PRACTICE—REMITTAL.

REVENUE—FALSE RETURN .. 73
See CRIMINAL LAW—Revenue.

REVENUE—APPEAL—PRACTICE 189
See SUCCESSION DUTY.

SERVICE OUT OF JURISDICTION —REVENUE 189
See SUCCESSION DUTY.

STAMP—DOCUMENT STAMPED IN IRISH FREE STATE—ADMISSIBILITY IN EVIDENCE *in Courts in Northern Ireland—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39) *s.* 14—*Double Taxation Relief Act* (Northern Ireland), 1923 (13 & 14 *Geo. 5, c.* 14) *Sch. Part* 3. The vendor of an estate situate in County Antrim, which was in process of sale through the Land Purchase Commission under the Northern Ireland Land Act, 1925, executed a mortgage to the Bank of Ireland of the bonus payable in respect of the sale. This instrument, which was dated the 24th day of April, 1926, contained a covenant on the part of mortgagees to re-assign the premises on re-payment of the principal and interest thereby secured. It was executed by the mortgagor at his residence in County Antrim and by the mortgagees in Dublin, where it was stamped with an Irish Free State stamp in respect of the duty chargeable thereon. Upon the ruling of the final schedule of incumberances the Judicial Commissioner declined to accept the mortgage in evidence on the ground that it was not properly stamped in accordance with the provisions of the Stamp Act, 1891. *Held*, by the Court of Appeal (reversing the decision of the Judicial Commissioner) that the mortgage was chargeable with stamp duty in the Irish Free State within the meaning of the Double Taxation Relief Act (Northern Ireland), 1923, Part 3, paragraph (*a*), and that it was accordingly properly stamped and admissible in evidence in Northern Ireland. *Estate of Macartney.* [C.A. 1

STAMP ACT—IRISH FREE STATE STAMP 1
See STAMP.

STATUTES—

——16 & 17 Vic., c. 51, ss. 5, 50 .. 189
See SUCCESSION DUTY.

——16 & 17 Vic., c. 119, ss. 1, 3, 8, 10, 11 21
See BETTING.

——23 & 24 Vic., c. 38, s. 13 .. 80
See ADMINISTRATION—INTESTATE'S ESTATE.

——33 & 34 Vic., c. 109, s. 6. .. 183
See PRACTICE—REMITTING.

——41 & 42 Vic., c. 52, ss. 28, 250, 255, 260 34
See PUBLIC HEALTH.

——54 & 55 Vic., c. 39, s. 14 .. 1
See STAMP.

——8 & 9 Geo. 5, c. 40, s. 224 .. 73
See CRIMINAL LAW—REVENUE.

——10 & 11 Geo. 5, c. 67, ss. 21, 29 1
See STAMP.

——10 & 11 Geo. 5, c. 67, ss. 21, 69 189
See SUCCESSION DUTY.

——13 Geo. 5, sess. 2, c. 1, Sch. Art. 73 1
See STAMP.

——13 & 14 Geo. 5, c. 14, Sch. Part 3 1
See STAMP.

STATUTORY RULES AND ORDERS—
——1905 R.S.C. (Ir.) Or. 2, r. 5 .. 189
See SUCCESSION DUTY.
——1905 R.S.C. (Ir.) Or. 68 rr. 1, 3 189
See SUCCESSION DUTY.

SUCCESSION DUTY—PERSON ASSESSED RESIDING IN ENGLAND—RIGHT OF APPEAL—*Succession Duty Act, 1853, section 50—Implied repeal—Government of Ireland Act,* 1920, *section* 21—*Revenue—Practice—Issue and service of writ out of the jurisdiction—R. S. C.,* 1905 *Order* 68 (*Revenue*)—*Leave of Court.* The intended defendant, who resided in London, was assessed as an accountable party for succession duty in respect of the cesser of a moiety of an annuity of £2,000, charged upon lands situate in Northern Ireland. The intended defendant gave notice of his intention to appeal against the said assessment to the High Court of Justice in England under section 50 of the Succession Duty Act, 1853. On an application by the Attorney-General for the leave of the Court to issue and serve a writ of subpoena out of the jurisdiction to recover the amount of the said assessment. *Held,* by the King's Bench Division (Moore, L.C.J. and Brown, J.), that the right of appeal under section 50 of the Succession Duty Act, 1853, was not repealed by the Government of Ireland Act, 1920, and, accordingly, that no Order should be made. *Held,* by the Court of Appeal (Andrews, Best, L.J.J, and Megaw, J.) that it was not necessary for the Crown to come to the Court for liberty to issue and serve writs of subpoena in revenue matters out of the jurisdiction in any part of the United Kingdom, and that for this reason no Order should be made. *R. v. Gardiner* [1920] 2 *I.R.* 339 *overruled. Attorney-General v. Jaffé.* [C.A. 189

SUMMONS AND INFORMATION—PETTY SESSIONS .. 21
See BETTING.

TAXATION (DOUBLE) RELIEF 1
See STAMP.

TRUST, RESULTING—CY-PRÈS 150
See CHARITY.

VISIBLE MEANS—REMITTING 183
See PRACTICE—REMITTING.

WILL—CHARITY—CY-PRES .. 150
See CHARITY.

WILL — CONSTRUCTION — BEQUEST CONDITIONAL *on testator's friends keeping him out of a lunatic asylum.* The testator's will contained the following residuary clause:— "I "bequeath the remainder of my pro- "perty to my brother ——, on condition "that my friends keep me out of a "lunatic asylum, but if they allow me to "be put into a lunatic asylum, I do then "bequeath to the British Home and "Foreign Bible Society the sum of "seven hundred pounds and to my "brother ————, I bequeath the "remainder of my property." About eighteen months after the execution of the will, and five years prior to his death, the testator had been committed to a lunatic asylum on the information of a neighbour and had been detained for a period of one month. *Held,* that the condition imposed by the testator was valid, and that in the events which had happened the gift over to the British and Foreign Bible Society took effect. *McKee v. Archbold.* [Ch. D. 47

WILL—LEGACIES SUBJECT TO A CONDITION *to assume testator's name within a fixed time—Failure to appreciate and perform Condition—Condition precedent or condition subsequent—Absence of gift over.* A testator after certain devises and bequests added a proviso to his will that no person should be entitled to any share in his residuary estate unless he or she within three months after the death of testator's wife or after he or she should attain the age of twenty-one, whichever should last happen, should assume the testator's surname unless prevented from doing so by death. Testator's widow died in 1929, N. T., who had died before the execution of the will, left one child surviving her, R. A. L., who predeceased the testator's widow leaving two children, I.B. (wife of J. B.) and H. L. I. B. died more than three months after the death of the widow, without having assumed the testator's surname, and H. L. was still alive at the date of the hearing, but had not adopted the testator's surname within three months of the death of the widow. *Held,* that the condition was a condition subsequent and that the residue on the death of the testator's widow

was vested in the persons designated in the residuary clause, though subject to being divested if the condition was not complied with. *Held*, also, that as there was no gift over in case of non-compliance, the proviso should be treated as directory not mandatory, that the time for adopting the name was not of the essence of the gift and that the condition would be sufficiently complied with by the legatees adopting the name before getting their legacies paid. *Dinsmore v. Finlay.* [Ch. D. 89

WILL—CONSTRUCTION—"HEIRS"—WORD "HEIR" APPEARING IN THE FORM "HEIRS," WITH "S" AT THE END STRUCK OUT, BUT STILL VISIBLE—*Gift of farm of land, money, goods and chattels—Gift over on death without issue or an heir to testator's brother or his "heir."* A testator left his farm, money, goods and chattels, to his son, H. B., subject to certain legacies. The will also contained the following clause:—"I also direct should my "son, H. B., die without issue or an "heir, I allow my said farm, money, "goods and chattels to go to my "brother, J. B., or his heirs," subject to the legacies already referred to. Where the word "heir" appeared secondly in the will, it appeared in the form "heirs" with the "s" at the end struck out but still visible, showing a correction of the form apparently originally written. *Held*, by Megaw, J., following *Gann v. Gregory* 3 De G. M. & G. 777, that the word in controversy should be read as "heir" not "heirs." *Held* further, following *Weldon v. Weldon* [1911] 1 I.R. 177 that the gift over did not take effect, that the 29th section of the Wills' Act did not apply, and that consequently H. B. took an absolute interest. *In re Ball, deceased; Cowan and Johnson v. Ball.* [Ch. D. 173